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TRANSCRIPT OF RECORD

IN THE

Supreme Court of the United States

October Term, 1949

No. 489

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Petitioners,

vs.

EMMA GRACE LOWE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 11953

United States

Court of Appeals

for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Appellees.

Transcript of Record

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Judicial Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Territory of Alaska, Fourth Judicial Division

No. 5493

UNITED STATES SMELTING REFINING & MINING COMPANY, a Maine Corporation,
Plaintiff,

vs.

EMMA GRACE LOWE,
Defendant.

COMPLAINT IN SUPPORT OF ADVERSE CLAIM

Plaintiff complains of defendant and for cause of action alleges:

I.

That the Plaintiff at all times mentioned in this complaint has been and is now a citizen of the United States of America.

II.

That the plaintiff, United States Smelting, Refining and Mining Company, is a corporation organized and existing under and by virtue of the laws of the State of Maine and is duly qualified to do business within the Territory of Alaska, and has paid its annual corporation tax last due, and has filed its annual report for the last calendar year.

III.

That prior to March 15, 1908, the property hereinafter described was a part of the public domain and was unoccupied and unclaimed mineral land,

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and on said date by virtue of compliance on the part of plaintiff's predecessors in interest with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and the local rules, regulations and customs of miners, plaintiff's predecessors in interest were and plaintiff and its said predecessors in interest ever since have been and are now the owners, subject only to the paramount title of the United States, and have been and are now in possession of the following described property, to-wit:

That certain placer mining claim commonly known as "The Snow [1*] Shoe Fraction," situate on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, and more particularly described as follows:

A fraction of 10 acres of placer mining ground, more or less, situated below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit, the location certificate of which was recorded in Volume 10 of Location Records, at page 113 thereof, as Instrument No. 23502.

IV.

That by virtue of the premises plaintiff has and claims the right to occupy and possess said The Snow Shoe Fraction placer mining claim and the mineral land embraced therein, and plaintiff is in

*Page numbering appearing at foot of page of original certified Transcript of Record.

possession thereof and is entitled to the possession thereof.

V.

That on May 26, 1945, defendant, Emma Grace Lowe, filed in the District Land Office of the United States at Fairbanks, Alaska, a certain plat of a survey of certain purported placer mining claims, together with her application for United States patent for said purported claims, naming and calling said purported claims in said plat and said application, "Scorpion Association," "Jupiter Association," and "Saturn Association," which survey and plat were designated as Mineral Survey No. 2105, and said defendant did on June 8, 1945, give notice that she would apply for United States patent for said purported placer mining claims and caused a notice of said application to be published in "Jessen's Weekly," a weekly newspaper published at Fairbanks, Territory of Alaska, the first publication of which notice appeared on June 5, 1945, and the last publication of which appeared on August 3, 1945.

VI.

That thereafter and within the time prescribed by law, to-wit, on March 29, 1946, plaintiff filed its adverse claim in said Land Office, and this suit is brought before the expiration of the period of 60 days after the filing of said adverse claim, in support thereof and for the purpose of determining the same and the right of possession to said The Snow Shoe Fraction placer mining claim.

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VII. [2]

That the defendant claims an estate and interest in said The Snow Shoe Fraction placer mining claim and the mineral land adverse to plaintiff, and that said claim of defendant is without any right whatsoever, and said defendant has no estate, right, title or interest whatever in said The Snow Shoe Fraction placer mining claim, or any part thereof.

Wherefore, plaintiff prays judgment as follows:

1. That plaintiff's title to said The Snow Shoe Fraction placer mining claim and the land included therein be quieted and that defendant be required to set forth any claim thereto, and that said adverse claims be determined by decree of this court;

2. That by said decree it be adjudged defendant has no estate or right, title or interest whatever in or to said The Snow Shoe Fraction placer mining claim, or the land included therein, and that the right, title and interest of plaintiff therein, subject only to the paramount title of the United States of America, is good and valid;

3. For costs of suit herein incurred; and

4. For such other and further relief as is meet and proper in the premises.

/s/ SOUTHALL R. PFUNG,
Attorney for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed May 27, 1946. [3]

In the United States District Court for the Territory of Alaska, Fourth Judicial Division

No. 5494

GUSTAF SODERBLOM, WALTER JENSEN, and UNITED STATES SMELTING, REFINING and MINING COMPANY, a Maine corporation,

Plaintiffs,

vs.

EMMA GRACE LOWE,

Defendant.

COMPLAINT IN SUPPORT OF ADVERSE CLAIM

Plaintiffs complain of defendant and for cause of action allege:

I.

That the plaintiffs, and each of them, are and at all times mentioned in this complaint have been and are now citizens of the United States of America.

II.

That the plaintiff, United States Smelting, Refining and Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Maine and is duly qualified to do business within the Territory of Alaska, and has paid its annual corporation tax last due, and has filed its annual report for the last calendar year.

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III.

That prior to March 20, 1908, the property hereinafter described was a part of the public domain and was unoccupied and unclaimed mineral land, and on said date by virtue of compliance on the part of plaintiffs' predecessors in interest with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and the local rules, regulations and customs of miners, plaintiffs' predecessors in interest were and plaintiffs and their said predecessors in interest ever [5] since have been and are now the owners, subject only to the paramount title of the United States, and have been and are now in possession of the following described property, to wit:

That certain placer mining claim commonly known as "L Association," situate on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, and more particularly described as follows:

Beginning at Corner No. 1, which is situated 1300 feet northeast of the junction of Fairbanks and Fish Creek, and is common with the southwest corner of Frost Claim, M. S. 1690; thence in a southwesterly direction approximately 550 feet to Corner No. 2; thence in a southwesterly direction approximately 1350 feet to Corner No. 3; thence in a northwesterly direction approximately 550 feet to Corner No. 4; thence in a northwesterly direction approximately 1280 feet to Corner No. 5; thence in a southwesterly direction approximately

1450 feet to Corner No. 6; thence in a southeasterly direction approximately 1450 feet to Corner No. 7; thence in a northeasterly direction approximately 660 feet to Corner No. 8; thence in a southeasterly direction approximately 950 feet to Corner No. 9; thence in a northeasterly direction approximately 2100 feet to Corner No. 10; thence in a northeasterly direction approximately 1350 feet to Corner No. 11; thence in a northwesterly direction approximately 1300 feet to Corner No. 1, initial post and place of beginning. Said claim is a creek claim, situated below discovery.

IV.

That by virtue of the premises plaintiffs have and claim the right to occupy and possess said L Association placer mining claim and the mineral land embraced therein, and plaintiffs are in possession thereof and are entitled to the possession thereof.

V.

That on May 26, 1945, defendant Emma Grace Lowe filed in the [6] District Land Office of the United States at Fairbanks, Alaska, a certain plat of a survey of certain purported placer mining claims, together with her application for United States patent for said purported claims, naming and calling said purported claims in said plat and said application, "Scorpion Association," "Jupiter Association," and "Saturn Association," which survey and plat were designated as Mineral Survey No. 2105, and said defendant did on June 8, 1945, give notice that she would apply for United States

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patent for said purported placer mining claims and caused a notice of said application to be published in "Jessen's Weekly," a weekly newspaper published at Fairbanks, Territory of Alaska, the first publication of which notice appeared on June 5, 1945, and the last publication of which appeared on August 3, 1945.

VI.

That thereafter and within the time prescribed by law, to-wit, on March 29, 1946, plaintiffs filed their adverse claim in said Land Office, and this suit is brought before the expiration of the period of 60 days after the filing of said adverse claim, in support thereof and for the purpose of determining the same and the right of possession to said L Association placer mining claim.

VII.

That the defendant claims an estate and interest in the said L Association placer mining claim and the mineral land adverse to plaintiffs, and that said claim of defendant is without any right whatsoever, and said defendant has no estate, right, title or interest whatever in said L Association placer mining claim, or any part thereof.

Wherefore, plaintiffs pray judgment as follows:

1. That plaintiffs' title to said L Association placer mining claim and the land included therein be quieted and that defendant [7] be required to set forth any claim thereto, and that said adverse claims be determined by decree of this court;

2. That by said decree it be adjudged defendant has no estate or right, title or interest whatever

in or to said L Association Placer mining claim, or the land included therein, and that the right, title and interest of plaintiffs therein, subject only to the paramount title of the United States of America, is good and valid;

3. For costs of suit herein incurred; and

4. For such other and further relief as is meet and proper in the premises.

/s/ SOUTHALL R. PFUND,
Attorney for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed May 27, 1946. [8]

[Title of District Court and Cause No. 5493.]

ANSWER OF DEFENDANT

Comes now the defendant, appearing in proper person, and, for answer to plaintiff's complaint in support of adverse claim on file herein, admits, denies and alleges as follows:

FIRST DEFENSE—ADMISSIONS AND DENIALS

I.

Admits the allegations of paragraphs I and II of plaintiff's complaint.

II.

Answering paragraph III thereof, admits that prior to March 15, 1908, the land therein attempted to be described, (if and to the extent it is in con-

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flict with the mining claims of the defendant, hereinafter mentioned), was a part of the public domain, and was unoccupied and unclaimed mineral land, and denies the remaining allegations of said paragraph and specifically denies that the attempted location of the so-called Snow Shoe Fraction claim was of any force, effect or validity.

III.

Denies the allegations of paragraph IV of said complaint.

IV.

Admits the allegations of paragraph V thereof, excepting any inference of invalidity from the use of the word "purported" in connection with defendant's locations, and in that regard alleges that, as hereinafter set forth, this defendant's claims are, in all respects, good, valid and subsisting locations. [10]

V.

Admits paragraph VI of said complaint.

VI.

Admits that this defendant claims an estate and interest in the ground alleged to be covered by the said Snow Shoe Fraction Claim, if and to the extent the same conflicts with her said Jupiter Association, Scorpion Association and/or Saturn Claims (according to the allegations of the adverse claim as hereafter set forth, it is now alleged to cover a small triangle in the northeast corner of the Scorpion Association) and denies the allegations of paragraph VII, except as admitted.

SECOND DEFENSE—AFFIRMATIVE MATTER:

And for a second and affirmative defense to the allegations of plaintiff's said complaint, defendant alleges as follows:

I.

That on and prior to March 15, 1908, the ground covered by the plat and survey of the Scorpion Association, Jupiter Association and Saturn placer mining claims, being mineral survey No. 2105, referred to in paragraph V of plaintiff's complaint, was vacant, unappropriated mineral land; that on said date one W. E. Sullivan, who plaintiff claimed as its predecessor in interest, apparently sought to locate the so-called Snow Shoe Fraction claim, upon a portion of the same, or other lands in that locality. That the said attempted location of the Snow Shoe Fraction claim was wholly insufficient, illegal and void, and did not comply with the laws of the United States, or the Territory of Alaska, or the rules and regulations prescribed by the Land Department of the United States, or the local rules, regulations and customs of miners then in force and effect in that district, in that, among other things, the boundaries of said purported claim were not marked so that the same could be readily traced, or at all, no discovery of minerals was made thereon until many years afterwards, and the purported location notice alleged to have been posted upon said claim and thereafter [11] and on June 11, 1908, recorded in Volume 10, page 113, Records of Location, did not contain such a description of the claim located by reference to some natural ob-

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ject or permanent monument as would identify the claim, but, on the contrary, the said location notice was in words and figures as follows:

"23502. Notice of Location.

Notice is hereby given that the undersigned has located a fraction of 10 acres of placer mining ground, more or less, situated in Fairbanks Mining District of Alaska, on Fish Creek, Tributary of Little Chena to be known as The Snow Shoe Fraction described as follows, to-wit: Below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit.

Gold discovered—190—

Located March 15, 1908

W. E. Sullivan, Locators."

That said description, which is the same as the description set forth in plaintiff's complaint, was and is wholly insufficient to identify the said ground sought to be covered thereby, or to enable any third party to locate the claim or establish the boundaries thereof.

II.

That further the boundaries of said claim have been changed many times since the purported location thereof in 1908, and particularly since the year 1913, but the location notice has never been amended as required by law in such cases. That as appears from the allegations of paragraphs V and VI of plaintiff's complaint, this is a suit brought in support of an adverse claim filed by plaintiff in the Land Office, in connection with a

patent proceeding brought by this defendant upon the said Scorpion Association, Jupiter Association and Saturn claims, mineral survey No. 2105. That the plaintiff's adverse claim filed in the Land Office on March 29, 1946, as alleged in paragraph VI of plaintiff's complaint, has attached to it as Exhibit B a plat showing the land now claimed as covered by the said Snow Shoe Fraction claim. That such land [12] bears no resemblance or connection whatsoever to the ground originally claimed under the Snow Shoe Fraction location, as described in the original location notice, and in plaintiff's complaint; but, on the contrary, purports to cover a small wedge-shaped parcel containing less than two acres, lying in the extreme northeast corner of the Scorpion Association claim, being approximately 565 feet in length along the south side and 181 feet along the west end, and 650 feet at the north side, running to a point on the east end, and not touching or approaching Fish Creek at any point. That there is accordingly a complete and total variance between the allegations of plaintiff's complaint and said adverse claim.

III.

In addition thereto, the ground now claimed under the Snow Shoe Fraction is entirely different from the ground originally said to be covered thereby and such present claim is based upon no location or amendment of a previous location whatsoever, and is wholly void.

IV.

That the plaintiff, and its predecessors, did not

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do the annual assessment work required by law upon the so-called Snow Shoe Fraction claim during each year following the date of such alleged location, but, on the contrary, during many of such years they wholly failed to perform such work or otherwise protect the said location. Among other defaults, defendant directs attention to the following:

(a) No labor or improvements were performed or made, nor was any affidavit of labor filed for any year prior to the year 1915 and proof of labor was filed by the original locator Sullivan for 1915; although, to the best knowledge and belief of the defendant, proper and sufficient work to protect the claim was not actually done.

(b) During the years 1917 and 1918, while the moratorium during the first world war was in effect, no assessment work was done, but in 1917 a suspension notice was filed on behalf of the locator Sullivan, and in 1919 Sullivan personally claimed exemption for that year. [13]

(c) No annual assessment work was done or proof of labor filed for the years 1919 to 1922; for the fiscal year July 1, 1922, to July 1, 1923, the proof of labor was filed although the defendant is without knowledge as to the amount and character of the work actually done. Thereafter no labor or improvements were performed or made and no proof of labor filed until 1928, when this claim, together with a large number of other claims was transferred to The First National Bank of Fairbanks to hold as trustee. Thereafter, for the fiscal

years 1928 and 1929, proofs of labor was filed upon this and a large number of other claims on behalf of said Bank. That the said proofs of labor allege drilling in connection with a proposed dredging operation; that the said dredging operation was never in fact commenced and shortly thereafter the claims were re-conveyed by the Bank to the original owners and defendant therefore alleges that under the circumstances the said drilling was not proper assessment work for the claims in the group according to the best knowledge and belief of the defendant and no drill holes were actually placed upon the said Snow Shoe Fraction claim.

(d) That no labor or improvements were performed or made, and no proofs of labor filed until the suspension statute came into force during the depression years. In 1933 and 1934 suspension was claimed by, among others, Messrs, Hess, McCandlish and Sullivan, who were then the record owners of the said Snow Shoe Fraction. In connection with the 1934 assessment, two of said claimants, Messrs. Hess and McCandlish, had already claimed a suspension upon the maximum amount of acreage allowed to them under the 1934 suspension act.

(e) No labor was performed or improvements made upon said claim during any of the depression years covered by the exemption statutes and no suspension notices whatever were filed for the subsequent years while the suspension was in effect, or until the fiscal year July 1st, 1939, to July 1st, 1940. During such fiscal year from July 1st, 1939, to July 1st, 1940, a proof of labor was filed claim-

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ing certain work alleged to have been performed by Messrs. Sutherland and Radovitch. Such work was not in fact proper assessment work because at the time the same was performed, said Sutherland and Radovitch were acting not under contract with or as the agents or employees of the plaintiff, but rather on their own behalf as adverse locators and performed the work claimed in support of an adverse location thereon, their rights under which were subsequently purchased by the plaintiff.

V.

That on July 31, 1941, and while the ground in question was still a part of the public domain, and was unoccupied and unclaimed mineral land (the said purported location of the Snow Shoe Fraction, if it in fact undertook to cover the same or any part [14] thereof being void from its inception, as aforesaid, and the boundaries thereof having been changed repeatedly without any authority whatsoever as above stated so that the ground now claimed thereunder is entirely different from and bears no relation to the original location, and the location having further been rendered void by failure to perform the annual labor during the years above mentioned, and the ground subject to re-location as a result) the defendant's predecessor in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, and the rules and regulations prescribed by the Land Department of the United States and the local customs, regulations and customs of miners, located the Saturn placer mining claim mentioned and described in

said mineral survey No. 2015 referred to in paragraph V of plaintiff's complaint, and thereupon the defendant's predecessor in interest became, and ever since said time the defendant and her predecessor in interest have been, and defendant now is, the owner, subject only to the paramount title of the United States, and has been and now is in possession of said mining ground so covered by said Saturn claim. That in like manner, on October 29, 1941, and while said ground so covered thereby was still vacant and unoccupied, as aforesaid, the defendant's predecessors in interest by virtue of like compliance located the Scorpion Association and Jupiter Association placer mining claims, likewise included in and described in said mineral survey No. 2105, and thereupon became and were, and ever since said time, the defendant and her said predecessors in interest have been and now are the owners, subject only to title paramount in the United States, and have been and now are in possession of the said Scorpion Association and Jupiter Association placer mining claims and of the ground covered thereby also. The ground now claimed under the said Snow Shoe Fraction is, as aforesaid, a small triangular fraction of less than two acres in the northeast corner of the Scorpion Association. [15]

VI.

That such locations are prior, valid and subsisting locations and are covered by the application for patent mentioned in paragraph V of plaintiff's complaint, which is now regularly pending

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in the United States Land Office and upon which publication has been regularly completed. That this defendant is a citizen of the United States and in all respects competent and qualified to apply for patent to said mining claims and that by virtue of the premises the defendant has and claims the right to occupy and possess the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and the mineral land embraced therein, and defendant is now in possession thereof and is entitled to the possession thereof.

Wherefore, defendant prays judgment as follows:

1. That plaintiff take nothing by its complaint on file herein.

2. That defendant be declared to be the owner and entitled to the possession of the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and that plaintiff has no right, title or interest in and to the said placer mining claims, or either thereof, or any portion of the ground covered thereby.

3. For defendant's costs and disbursements herein incurred.

4. For such other and further relief as the Court may find meet and equitable in the premises.

/s/ EMMA GRACE LOWE,
Defendant in Proper Person.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed Oct. 14, 1946. [16]

[Title of District Court and Cause No. 5494.]

ANSWER OF DEFENDANT

Comes now the defendant, appearing in proper person, and for answer to plaintiffs' complaint in support of adverse claim on file herein, admits, denies and alleges as follows:

FIRST DEFENSE—ADMISSIONS AND DENIALS

I.

Admits the allegations of paragraphs I and II of plaintiffs' complaint.

II.

Admits that prior to March 20, 1908, the land therein described, (if and to the extent it is in conflict with the mining claims of the defendant hereinaftermentioned) was a part of the public domain and was unoccupied and unclaimed mineral land, and denies the remaining allegations of paragraph III of said complaint, and specifically denies that the attempted location of the so-called L Association claim was of any force, effect or validity.

III.

Denies the allegations of paragraph IV of said complaint.

IV.

Admits the allegations of paragraph V of said complaint, excepting any inference of invalidity

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from the use of the word "purported" in connection with defendant's locations, and in that regard alleges that as hereinafter alleged this defendant's claims are in all respects good, valid and subsisting locations.

V.

Admits paragraph VI of said complaint.

VI.

Admits that this defendant claims an estate and interest in the ground alleged to be covered by the said L Association placer mining claim, if and to the extent the same conflicts with her said Jupiter Association, Scorpion Association, and Saturn claims, and denies the allegations of said paragraph, except as admitted.

SECOND DEFENSE (AFFIRMATIVE MATTER)

And for a second and affirmative defense to the allegations of plaintiffs' said complaint, defendant alleges as follows:

I.

That on and prior to March 20, 1908, the ground covered by the plat and survey of the Scorpion Association, Jupiter Association and Saturn placer mining claim, being mineral survey No. 2105, referred to in paragraph V of plaintiffs' complaint, was vacant, un-appropriated mineral land. That on

said date, eight individuals who plaintiffs claim as their predecessors in interest, apparently sought to locate the so-called L Association claim upon a portion of the same, or some other lands in that locality. That the said attempted location of the L Association claim was wholly insufficient, illegal and void, and did not comply with the laws of the United States, or the Territory of Alaska, or the rules and regulations prescribed by the Land Department of the United States, or the local rules, regulations and customs of miners then in force and effect in that district, in that, among other other things, the boundaries of said purported claim were not marked so that the same could be traced, readily or at all, and the purported location notice alleged to have been posted upon said claim and thereafter and on June 11, 1908, recorded in Volume 10, Records of Locations at page 113, did not contain such a description of the claim located by reference to some natural object or permanent monument as would identify the [18] claim, but on the contrary the said location notice was in words and figures as follows:

"NOTICE OF LOCATION

Notice is hereby given that the undersigned has located 160 acres of placer mining ground situated in Fairbanks Mining District of Alaska on Fish Creek, tributary of Little Chena, to be known as

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the L Association, described as follows, to-wit: Opposite the mouth of Bear and Fairbanks Creek.

Gold discovered—190—.
Located March 20, 1908.

J. P. Hogan,	J. T. McGillevray,
W. H. Passage,	John Lappi,
E. A. Mitchell,	W. E. Sullivan,
D. van Woerdan,	John McCandlish,

By John McCandlish, their agent."

That said description was wholly insufficient to identify the said ground sought to be covered thereby or to enable any third party to locate the claim or the dimensions or boundaries thereof. No amendment of said claim was made or attempted until long after the defendant's rights had attached and become vested through the filing of the locations upon the Scorpion Association, Jupiter Association and Saturn claims hereafter referred to and her patent proceedings had been commenced.

II.

That plaintiffs' predecessors did not do the annual assessment work required by law upon the so-called L Association claim, during each year following the date of such alleged location, but on the contrary during many of such years they wholly failed to perform such work or otherwise protect the said

location. Among other defaults defendant directs attention to the following:

(a) No labor or improvements whatever were performed or made nor was any affidavit of labor filed for any year prior to the year 1917. During the years 1917 and 1918, while the moratorium during the first world war was in effect, no assessment work was done but in 1917 a suspension notice was filed by the plaintiff, Soderblom, as agent for his associates, and in 1919 one W. E. Sullivan filed for the year 1918 for himself alone, which suspension would if anything apply to his individual undivided interest and would not in [19] any way protect the interests of his co-owners. No annual assessment work was done or proof of labor filed for any year from 1919 to July 1st, 1922; for the fiscal year July 1st, 1922 to July 1st, 1923, the annual labor was done and proof of labor properly filed. Thereafter no labor or improvements was performed or made and no proof of labor filed until the suspension statutes came into force during the depression years. In 1933 a suspension notice was filed covering the fiscal year July 1, 1932 to July 1, 1933, by Messrs. Hogan, Mitchell, Hess, Sullivan, McCandlish and Gibbs and Jensen, claiming as the owners of said L Association claim. In the ensuing year 1933-34, a suspension notice was filed by the first five above mentioned only, which would have been effective to cover only their interests in the claim in any event, and in addition to which certain of said claimants Messrs. Hess and McCandlish had already claimed suspension upon the maximum amount of acreage allowed

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to them under the 1934 suspension act. No labor was performed or improvements made upon the claim during any of the depression years covered by the exemption statute and no suspension notices whatever were filed for the subsequent years while the suspension was in effect, or until the fiscal year July 1st, 1939, to July 1st, 1940. During the fiscal year from July 1st, 1939, to July 1st, 1940, a proof of labor was filed claiming certain work alleged to have been performed by Sutherland and Radovitch. Such work was not in fact proper assessment work because at the time the same was performed, said Sutherland and Radovitch were acting not under contract with or as the agents or employees of the plaintiffs, but rather on their own behalf as adverse locator and performed the work claimed in support of an adverse location thereon, their rights under which were subsequently purchased by the plaintiffs. [20]

III.

That on July 31st, 1941, and while the ground in question was still a part of the public domain and was unoccupied and unclaimed mineral land (the said purported location of the L Association, if it in fact undertook to cover the same, or any part thereof, being void from its inception, as aforesaid, and the location having in any event been rendered void by failure to perform the annual labor during the years above mentioned and the ground subject to relocation) the defendant's predecessor in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules

and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners located the Saturn Placer Mining Claim, mentioned and described in the said Mineral Survey No. 2015, referred to in paragraph V of plaintiffs' complaint, and thereupon the defendant's predecessor in interest became and ever since said time the defendant and her predecessor in interest have been and defendant now is the owner subject only to the paramount title of the United States and has been and now is in possession of said mining ground so covered by said Saturn claim. That in like manner, on October 29, 1941, and while said ground so covered thereby was still vacant and unoccupied, as aforesaid, the defendant's predecessors in interest by virtue of like compliance located the Scorpion Association and Jupiter Association Placer Mining Claims, likewise included in and described in said Mineral Survey No. 2105, and thereupon became and were, and ever since said time the defendant and her said predecessors in interest have been and now are the owner subject only to title paramount in the United States and have been and now are in possession of the said Scorpion Association and Jupiter Association Placer Mining Claims and of the ground covered thereby also. [21]

IV.

That such locations are prior, valid, and subsisting locations and are covered by the application for patent mentioned in paragraph V of plaintiffs' complaint, which is now regularly pending in the United States Land Office and upon which publication has

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been regularly completed. That this defendant is a citizen of the United States and in all respects competent and qualified to apply for patent to said mining claims and that by virute of the premises the defendant has and claims the right to occupy and possess the said Scorpion Association, Jupiter Association and Saturn placer mining claims and the mineral land embraced therein and defendant is now in possession thereof,

Wherefore, defendant prays judgment as follows:

(a) That plaintiffs take nothing by their complaint on file herein.

(b) That defendant be declared to be the owner and entitled to the possession of the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and that plaintiffs have no right, title or interest in and to the said placer mining claims, or either thereof, or any portion of the ground covered thereby.

(c) For defendant's costs and disbursements herein incurred.

(d) For such other and further relief as the Court may find meet and equitable in the premises.

/s/ EMMA GRACE LOWE,
Defendant in Proper Person.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed June 24, 1946. [23]

[Title of District Court and Cause No. 5493.]

REPLY OF PLAINTIFF

Now comes the plaintiff above named and for reply to the answer of defendant on file herein, admits, denies, and alleges as follows as to the second defense in said answer:

I.

Replying to the allegations of Paragraph I, denies that plaintiff's predecessors in interest sought to locate the said The Snow Shoe Fraction, and in that respect allege that said The Snow Shoe Fraction was located by plaintiff's predecessors in interest as described in the complaint on file herein and that said location was valid and sufficient under the mining laws and the rules and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners then in force and effect in said district; denies the remaining allegations of said paragraph as to the marking of boundaries and discovery of minerals, and the sufficiency of the description in the location certificate.

II.

Denies the allegations of paragraphs II and III of said second defense. [27]

III.

Denies the allegations of Paragraph IV of said second defense except as to those portions thereof which refer to labor performed or "notices of intention to hold" filed by plaintiff's predecessors in interest which said paragraph recites.

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IV.

Denies the allegations of Paragraphs V and VI of said second defense.

As and for a further and separate reply to the allegations contained in said answer, plaintiff alleges that it and its predecessors in interest have been in the uninterrupted, adverse, notorious possession of said The Snow Shoe Fraction and the property embraced therein under color and claim of title for more than seven years next preceding the alleged location of said defendant's claims and her assertion of interest in said real property.

Wherefore, plaintiff prays for relief as asked in its complaint on file herein.

/s/ SOUTHALL R. PFUND,
/s/ CHAS. J. CLASBY,
Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed Nov. 7, 1946. [28]

[Tile of District Court and Cause No. 5494.]

REPLY OF PLAINTIFFS

Now come the plaintiffs above named and for reply to the answer of defendant on file herein, admit, deny, and allege as follows as to the second defense in said answer:

I.

Replying to the allegations of paragraph I,

plaintiffs admit that the ground described in said paragraph in so far as the same was a portion of the L Association was vacant, unappropriated mineral land; deny that plaintiff's predecessors in interest sought to locate said L Association, and in that respect allege that said L Association was located by plaintiffs' predecessors in interest as described in the complaint on file herein and that said location was valid and sufficient under the mining laws; deny the remaining allegations of said paragraph I as to the marking of the boundaries and the sufficiency of the location certificate.

II.

Deny the allegations of paragraph II of said second defense in said answer except as to those portions thereof which refer to labor performed or "notices of intention to hold" which said paragraph recites, but deny the conclusions of said paragraph [30] as drawn therefrom.

III.

Deny the allegations of paragraph III of said second defense in said answer and deny any implication from the portion of said paragraph III which is in parentheses.

IV.

Deny the allegations of paragraph IV of said second defense in said answer.

As and for a further and separate reply to the allegations contained in said answer, plaintiffs allege that they and their predecessors in interest have been in uninterrupted, adverse, notorious possession of said L Association and the property em-

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braced therein under color and claim of title for more than seven years next preceding the alleged location of said defendant's claims and her assertion of interest in said real property.

Wherefore, these plaintiffs pray for relief as asked in their complaint on file herein.

/s/ SOUTHALL R. PFUND,
/s/ CHAS. J. CLASBY,
Attorneys for Plaintiffs.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed June 23, 1947. [34]

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5493

UNITED STATES SMELTING, REFINING & MINING COMPANY, a Maine Corporation,
Plaintiff,

vs.

EMMA GRACE LOWE,
Defendant.

and

No. 5494

FIRST NATIONAL BANK OF FAIRBANKS, WALTER JENSEN, and UNITED STATES SMELTING, REFINING & MINING COMPANY, a Maine Corporation,
Plaintiffs,

vs.

EMMA GRACE LOWE,
Defendant.

INSTRUCTIONS TO THE JURY

Members of the Jury: You are instructed:

I.

(A) That, as limited by the issues in these cases, the laws in force in Alaska in 1908 pertaining to the location of a gold placer mining claim upon the open, unclaimed, unoccupied mineral lands constituting the Public Domain of the United States of America in Alaska, required the following mat-

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ters to be done in order to make a valid location, to wit:

1. That the locator make a discovery of gold as hereinafter defined, upon the ground included within said location.

2. That the locator should distinctly mark the boundaries of the claim upon the ground so that they could be readily traced.

(B) You are instructed that it is immaterial whether the discovery or the markings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

(C) You are instructed that to constitute a valid discovery of gold sufficient for the basis of a location, a locator must have discovered gold within the boundaries of the claim sought to be located, of such quantity and character and found under circumstances as to justify a man of ordinary prudence, not [32] necessarily a miner, in the further expenditure of his time and money in hope of developing the ground into a paying mine.

(D) The laws of Alaska in force in 1908 did not require the recording of any location certificate or notice. So, in the present case, it is not necessary to consider whether or not the location certificates filed conformed to the requirement of the law with reference to location certificates.

(E) It is conceded by the parties to these actions that in March, 1908, the month in which the Snow Shoe Fraction and the L Association were staked, that the ground included within the boun-

daries of said claims was open, unclaimed, unoccupied mineral lands constituting the Public Domain of the United States of America in Alaska.

(F) The laws in force in Alaska in 1908 did not require an agent to have a written power of attorney or other written authority from his principals in order to authorize him, the agent, to locate a placer mining claim for his principals within the Territory of Alaska. Consequently, the fact that there is no evidence in this case of any power of attorney or other written authority from the persons named as locators in the certificates of location introduced in evidence in this case in favor of John McCandlish, becomes immaterial.

(G) Under the pleadings the facts proved in this case and the law pertaining thereto, it is not necessary that the plaintiffs should prove any authority to John McCandlish from the persons named as locators of the L Association in the certificate of location in evidence in this case, in order to make the location of the L Association valid, as such authority is presumed by the law.

(H) Under the evidence in this case and the issues as made up by the pleadings, it is immaterial that the L Association contained within its boundaries as originally marked acreage in excess of 20 acres for each locator. [33]

II.

(A) In regard to the location of the Snow Shoe Fraction, you are instructed that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence in this case that its predeces-

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sor in interest, W. E. Sullivan, made a valid location of such claim in 1908. If the evidence is equally divided as to such location being a valid one, or if the evidence preponderates against such location being a valid one, you should find that said location was invalid. If the preponderance of the evidence in this case shows that said Sullivan, during the calendar year of 1908, did make a valid location of said Snow Shoe Fraction, you should find that said location was a valid one.

(B) In regard to the location of the L Association, you are instructed that the burden of proof is upon the plaintiffs in Cause Number 5494 to prove by a preponderance of the evidence in this case that the locators or their agent thereof as named in the location certificate in evidence in this case, made a valid location. If the evidence is equally divided as to such location being a valid one, or if the evidence preponderates against such location being a valid one, you should find the location invalid. If the preponderance of the evidence in this case shows that said locators, during the calendar year of 1908, did make a valid location of said L Association, you should find the location valid.

III.

(A) The laws pertaining to annual labor upon the Snow Shoe Fraction and the L Association require that $100 worth of work or improvements be done upon or for the benefit of each said claim for each annual labor year, except in those years in which such law was suspended as to annual labor.

(B) You are instructed that the law does not prescribe the particular kind of labor which is to be performed upon a mining claim, nor in what it shall consist, nor the manner in which it shall be performed. Nor does the law require that it shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. And you are [34] therefore instructed that any labor performed upon a claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine.

(C) The law presumes that when a person has made a valid location of a placer mining claim, he, the locator, will do the annual labor required by law to keep the claim alive. This presumption continues until it is shown by competent evidence that such annual labor was in fact not done.

In this case the defendant, Emma Grace Lowe, has alleged in her answer that during certain annual labor years, the annual labor required by law was not performed upon the claims in controversy herein. The burden of proof is upon said Emma Grace Lowe to prove such allegations, to-wit: to prove by a preponderance of the evidence that the annual labor was not done upon one or both of said claims for at least one annual labor year. If there is no evidence as to the annual labor not being done for any annual labor year, you should presume that the work was done and so find. If there is evidence that the annual labor work was not done upon either of said claims for any annual labor year, and if such evidence is equally divided

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or preponderates to the effect that such annual labor was done, you should find that such annual labor was done. If, on the other hand, the preponderance of the evidence shows that such annual labor was not done, you should so find.

IV.

(A) The annual labor years designated by law were as follows: for 1909 up to and including 1919, the calendar years were the annual labor years; for the annual labor year 1920, the period was from January 1, 1920, to and including the first day of July, 1921; for the annual labor year of 1921, the period from July 2, 1921 to noon, July 1, 1922, was designated; thereafter, each annual labor year commenced at noon, July 1. For the annual labor year beginning July 1, 1938, the law provided that work during the annual labor year or work commenced in good faith before noon, September 1, 1939, and prosecuted with reasonable diligence to completion, should be sufficient for the annual labor year of 1938. [35]

Consequently, if you designate work as being done or not being done for a designated annual labor year, it shall be deemed to be that year or the extension thereof as above mentioned.

V.

You are further instructed:

That in order to constitute legal annual labor for a placer mining claim, it is not necessary that the work or improvements necessarily be upon the claim itself, for it is the policy of the law to encourage the doing of annual labor in a manner

which will best develop the property, and is most likely to result in the production of precious minerals. The work may be done outside a claim or group of claims, provided such work is done in an honest effort to make a paying mine and in a manner tending to develop the claim or all of the claims for which the improvement is made. The courts have uniformly held that annual labor may be done outside of the claim or group of claims, and the universal rule is that proof may be offered that such work was done for the purpose of developing the claim, and that it tends to develop it, and when that is shown and that the value of such development work to the claim benefiited is $100, it is sufficient to comply with the requirements for annual labor.

In this case there was testimony introduced as to the construction of a ditch in the annual labor year commencing July 1, 1939, for the benefit and development of the L Association and seven other claims. As this ditch was alleged to be for the benefit of the L Association and was outside the boundaries of said claim, the burden of showing that it was in fact for the benefit of that claim is upon the plaintiff. If, considering all of the evidence in the case, you believe plaintiff has established by a preponderance of the evidence that said ditch was in fact for the benefit and development of said L Association in that it facilitated the working of the same and of other claims for which the ditch was designed, and the amount [36] constituting the reasonable value of said ditch was

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such that it amounted to at least $100 for each claim alleged to have been benefited and improved by the ditch, you will be justified in finding that it was sufficient annual labor for said year.

VI.

You are instructed that you need not consider whether or not annual labor was done by the plaintiff or their predecessors in interest for the calendar year of 1919 and the annual labor year commencing at noon, July 1, 1933, upon said Snow Shoe Fraction and L Association, as sufficient intentions to hold without annual labor have been filed as to said claims.

VII.

You are instructed that when a valid location of a placer mining claim is once made it vests in the locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon.

VIII.

(a) If you find that the locators of the L Association made a valid location of it, and that they and their successors successors in interest did not fail to do the annual labor required by law for said claim for any annual labor year between January 1, 1909 and noon of July 1, 1940 (except the calendar year of 1919 and the year commencing noon, July 1, 1933) on said claim, it will not be

necessary for you to consider the matters set forth in Instruction Number IX as to whether or not valid locations were made of the Scorpion Association, Jupiter Association and Saturn Claim.

(b) If you find that the said L Association was not validly located, or that ,if validly located, the owners thereof failed to do the assessment work for any annual labor year (except the calendar year of 1919 and the year commencing noon, July 1, 1933) in the period between January 1, 1909 and noon, July 1, 1940, the ground included therein would have been open, unoccupied, unclaimed mineral [37] lands of the United States, constituting the public domain in Alaska in 1941, and you should consider the matters set forth in Instruction Number IX hereinafter set forth as to the validity of the locations of the Scorpion Association, Jupiter Association and Saturn Claim.

IX.

The defendant, Emma Grace Lowe, in this action claims under locations made in 1941. The law in force in Alaska in the year 1941 requires for a valid location of placer mining claims as follows:

(a) That the locator of a placer mining claim must make a discovery of gold within the boundaries thereof, such discovery to be as hereinbefore mentioned in Instruction I-C.

(b) You are instructed that it is immaterial whether the discovery or the markings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

(c) "Sec. 356. Notice of location of placer claim;

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boundaries. The discoverer of a placer claim shall designate the location as follows:

1. By posting on one of the posts or monuments marking the boundaries of the claim a plain sign or notice containing:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The date of the location;

(d) The number in feet in length and width claimed; and

2. By erecting at each corner or angle of the claim substantial monuments or posts not less than three feet in height nor less than three inches in diameter, hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines and by cutting out, blazing or marking the boundary lines so that they can be readily traced."

"Sec. 357. Recording certificate of location. The locator or locators of any lode or placer claim shall, within ninety days after the date of posting the notice of location on the claim, cause such [38] claim to be recorded by filing with the recorder of the recording district in which the claim is located, a certificate of location which shall contain:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The number of feet in length and width of the claim;

(d) The date of discovering and of posting the notice of location;

(e) A description of the claim with such reference to some natural object or permanent monu-

ment that an intelligent person, with a knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the certificate of location within ninety days as herein provided shall constitute an abandonment of the claim and the ground shall be open to location; provided, however, that full compliance with the provisions of this section after the ninety day period has elapsed, but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator."

I instruct you that in order to establish a valid location of the Scorpion, Saturn and Jupiter claims, or either of them, the defendant, Emma Grace Lowe, for her principal, Evelyn Mahan, must prove by a preponderance of the evidence that she made a substantial performance of each step of location as above set forth.

If the defendant proves a valid location of either of said claims by a preponderance of the evidence, you should so find. On the other hand, if the evidence in the case proves there was no valid location of either of said claims by said defendant, or if the evidence as to the same is equally divided, you should find that such claim or claims was not validly located.

X.

(a) You are instructed that the law of Alaska, during the time involved in the matters in controversy in these cases, permitted, but did not require the filing of affidavits of annual labor, and that therefore you should not consider a failure to file

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an affidavit of annual labor as being any evidence that such annual labor was not performed. [39]

(b) The law of Alaska above-mentioned, makes an affidavit of annual labor which has been filed within three months of the end of the annual labor year prima facie evidence of the performance of the work therein stated, but if other evidence is introduced on the subject of annual labor or its value for the year covered by the affidavit, you should consider the affidavit and such other evidence and try to arrive at the truth of the matter and find in accordance with the preponderance of the evidence on that subject.

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

2. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

3. That a witness wilfully false in one part of his testimony may be distrusted in others.

4. That when the evidence is contradictory, the finding shall be in accordance with the preponderance of the evidence.

5. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to

produce and of the other to contradict; and, therefore,

6. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

7. That oral admissions of a party should be viewed with caution. Except where the court declares the evidence to be conclusive, you, members of the jury, are the judges of the value of all of the evidence [40] admitted in the case. However, your power of judging the effect of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence as administered by and given to you by the court in its instructions.

You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in conformity with the evidence or are logical deductions therefrom.

Your duty is to determine the facts of the case from the evidence submitted in conformity with the instructions of the court.

It is the duty of the judge of this court to instruct you as to the law involved in this case and it is your duty, as jurors, to accept as law and to follow the same, whatever is laid down to you as the law of the case by the judge of this court.

You are instructed as follows:

1. That by "preponderance of evidence" is meant the amount of evidence which taken on the

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whole produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto.

2. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court.

3. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence.

Pursuant to the foregoing instructions I have prepared a form of verdict with blanks for you to fill in, for you to take into your jury room. You should elect a foreman or forewoman who should sign the verdict upon which you unanimously agree. [41]

Herewith I hand you these instructions, the verdict above-mentioned, the pleadings in the case, and the exhibits, that have been introduced in evidence. Return all of these into court with your verdict.

Dated at Fairbanks, Alaska, this 14th day of August, 1947.

/s/ HARRY E. PRATT,
District Judge.

[Endorsed]: Filed Aug. 14, 1947. [42]

[Title of District Court and Causes Nos. 5493-94.]

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cases in an advisory capacity to the Court, do hereby find and make the following answers to the following questions, to wit:

1. Q. Did W. E. Sullivan, in 1909, make a valid location of the Snow Shoe Fratcion?

A. Yes.

2. Q. During any annual labor year (except the calendar year of 1919 and the year commencing noon, July 1, 1933) did the owner or owners of the Snow Shoe Fraction fail to do the annual labor upon the said Snow Shoe Fraction?

A. No.

3. If you have answered the immediately preceding question "yes", then designate what annual labor year or years the owners of the Snow Shoe Fraction failed to do the annual labor upon it. A.

4. Q. Did the locators of the L Association in 1909 make a valid location of that Association?

A. Yes.

5. Q. During any annual labor year (except the calendar year 1919 and the year commencing noon, July 1, 1933), did the owners of the said L Association fail to do the annual labor upon or for the benefit and development of the same? A. No.

6. Q. If you have answered the last preceding question "yes", [43] then designate the annual labor year or years in which the owners of said L Association failed to do the annual labor upon it.

A.

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The following questions are not to be propounded or answered unless you find that the L Association was not validly located, or that the annual labor required by law was not done upon or for the development of the L Association during the period above-mentioned in question Number 5.

7. Q. In 1941 did the defendant, Emma Grace Lowe, for her principal, Evelyn Mahan, individually as to the Saturn Claim, and individually and with a power of attorney from Evelyn Mahan as to the Jupiter Association and the Scorpion Association, make a valid location of all three of said claims? A.

8. Q. If you have answered the last preceding question "no", then designate which of said claims were not validly located. A.

/s/ C. L. LINDBERG,
Foreman or Forewoman.

Entered in Court Journal August 14. 1947. No. 35, Page 175-176.

[Endorsed]: Filed Aug. 14, 1947. [44]

[Title of District Court and Causes Nos. 5493-94.]

MOTION

Comes now the above named Defendant and files this, her Motion, in each of the above entitled causes of action and moves the court to render judgment for the Defendant, dismissing Plaintiffs' purported cause of action and to render judgment

for the Defendant in each of the above mentioned cases, and for grounds of said motion states:

I.

That the Plaintiffs have failed to prove the allegations of their complaint and the allegations of the Adverse Claim filed.

II.

That the Plaintiffs have failed to prove a location on either the "L" Association or the Snow Shoe Fraction as by law required.

III.

That the Plaintiffs have failed to prove the marking of the Snow Shoe Claim or the "L" Association on the ground as required by the laws of the Territory of Alaska in 1908.

IV.

That the Plaintiffs, by their own evidence, have proven no annual labor for many years between the attempted staking of the claims and the filing of the Defendant herein on each of said claims.

V.

That the Plaintiffs have failed to prove that they, or either of them were in the possession of the Snow Shoe Fraction or the "L" Association at the time of the filing of the Adverse Claim referred to in the Complaint, or at the time of the filing of the Complaints in the above mentioned causes.

VI.

That the Plaintiffs failed to file the Affidavits of Labor or Notices to Hold or to perform any labor on each of the claims for many years be-

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tween 1908 and 1941, at the time the Defendant staked the claims.

For all of which, Defendant moves the court for an order dismissing Plaintiffs' causes of action and to render judgment for Defendant on her Answer filed herein.

BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 14, 1947. [51]

[Title of District Court and Cause No. 5493.]

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

Comes now the Defendant and moves the court to return judgment in the above entitled cause Non Obstante Veredicto, and for grounds of said motion states:

I.

That the verdict rendered by the jury in this case is contrary to the clear weight of evidence, is not supported by any adequate evidence. In many instances there is no affidavit of labor being performed, or notices of claim of exemptions and intentions to hold, and no evidence of labor performed for many years between 1908 and 1946.

II.

That the Plaintiff never did prove possession, which is a requirement in an action to quiet title.

III.

That the rulings of the court prohibited the defendant from introducing competent evidence that would have caused the jury to render a different verdict if the evidence had been introduced.

IV.

That the court permitted incompetent, irrelevant, immaterial and prejudicial evidence to be introduced over the objection of the Defendant.

V.

That there is no competent evidence to establish location of the claim involved herein.

VI.

There is no evidence whatsoever to the effect that the labor performed, if any, was for the benefit of the claim involved.

VII.

That the court refused to instruct the jury at all on the contents of the Act of [52] 1907, which Act was in full force and effect at all times involved herein.

VIII.

That the court refused and neglected to instruct the jury on the law in effect from 1912 until 1934 which law is often referred to as The Wickersham Act.

IX.

The court erred in refusing to sustain the Defendant's Motion for dismissal of Plaintiff's cause of Action and to render judgment for the Defen-

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dant at the close of all of the evidence and before the case was submitted to the jury.

For all of which, Defendant moves for judgment Non Obstante Veredicto.

EMMA GRACE LOWE,
Defendant.

By BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 15, 1947. [53]

[Title of District Court and Cause No. 5494.]

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO

Comes now the Defendant and moves the court to return judgment in the above entitled cause Non Obstante Veredicto, and for grounds of said motion states:

I.

That the verdict rendered by the jury in this case is contrary to the clear weight of evidence, is not supported by any adequate evidence. In many instances there is no affidavit of labor being performed, or notices of claim of exemptions and intentions to hold, and no evidence of labor performed for many years between 1908 and 1946.

II.

That the Plaintiff never did prove possession, which is a requirement in an action to quiet title.

III.

That the rulings of the court prohibited the defendant from introducing competent evidence that would have caused the jury to have rendered a different verdict if the evidence had been introduced.

IV.

That the court permitted incompetent, irrelevant, immaterial and prejudicial evidence to be introduced over the objection of the Defendant.

V.

That there is no competent evidence to establish location of the claim involved herein.

VI.

There is no evidence whatsoever to the effect that the labor performed, if any, was for the benefit of the claim involved. [54]

VII.

That the court refused to instruct the jury at all on the contents of the Act of 1907, which Act was in full force and effect at all times involved herein.

VIII.

That the court refused and neglected to instruct the jury on the law in effect from 1912 until 1934 which law is often referred to as The Wickersham Act.

IX.

The court erred in refusing to sustain the Defendant's Motion for dismissal of Plaintiff's cause

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of Action and to render judgment for the Defendant at the close of all of the evidence and before the case was submitted to the jury.

For all of which, Defendant moves for judgment Non Obstante Veredicto.

EMMA GRACE LOWE,
Defendant.

By BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 15, 1947. [55]

[Title of District Court and Causes Nos. 5493-94.]

FINDINGS OF FACT AND CONSLUSIONS OF LAW

The above entitled actions to quiet title having heretofore been consolidated for purposes of trial and judgment by order of this court duly and regularly given and made pursuant to stipulation of the parties, came on regularly for trial on the 6th day of August, 1947, and succeeding days, before the Honorable Harry E. Pratt, Judge of the above-entitled court sitting with an advisory jury, Southall R. Pfund, Esq., and Charles J. Clasby, Esq., appearing for the plaintiffs, and Bailey E. Bell, Esq., appearing for the defendant, and evidence, both oral and documentary, having been introduced in behalf of the respective parties hereto, and the jury having been duly and regularly in-

structed, and the causes having been submitted to it, the jury having rendered its advisory verdict, in favor of the Plaintiffs and against the defendant, and the causes having been finally submitted to the Court for decision on the 15th day of August, 1947, the court having considered the evidence, the arguments and briefs of counsel and the advisory verdict of the jury, and being fully advised in the [56] premises, now confirms as correct and adopts the findings of fact of the advisory jury in its verdict herein and makes and files herein its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

I.

Plaintiff, Gustaf Soderblom during his lifetime was, and plaintiffs Walter Jensen and United States Smelting Refining and Mining Company were at all times mentioned herein and now are citizens of the United States of America.

II.

Plaintiff United States Smelting Refining and Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Maine, and is duly qualified to do business within the Territory of Alaska, and has paid its annual corporation tax last due and has filed its annual report for the last calendar year.

III.

Prior to March 20, 1908, the property, hereinafter described and referred to as the Snow Shoe Fraction and L Association, was a part of the public domain and was unoccupied and unclaimed

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mineral land. On said date plaintiffs' predecessors in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and by the local rules, regulations and customs of minors, made a valid location of a gold placer mining claim commonly known as "The Snow Shoe Fraction," situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks recording precinct, Territory of Alaska, which said claim was more particularly described as follows:

> A fraction of 10 acres of placer mining ground, more or less, situated below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit, the location certificate of which was recorded in Volume 10 of Location Records, at page 113 thereof, as Instrument No. 23502. [57]

Thereafter plaintiff United States Smelting Refining and Mining Company as the owner of said The Snow Shoe Fraction and of the claims adjoining it on the north and west, included a portion of said The Snow Shoe Fraction in said adjoining claims, and said adjoining claims were included in United States Mineral Surveys No. 1690 and No. 1696, and after proceedings duly and regularly had and taken, the United States issued its patent deed covering said claims. The remainder of said The Snow Shoe Fraction as the same existed at the time of the commencement of this action was and is as

shown on Mineral Survey No. 2153, Plaintiffs' Exhibit No. K, herein, and is described as follows:

> Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north 24° 33′ west, 7112.24 feet; thence south 50° 26′ east 181.90 feet to Cor. No. 2, identical with Cor. No. 8, L Association; thence north 60° 07′ east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south 75° 24′ west along line, Survey No. 1690, Lulloo 360.20 feet to Cor. No. 4, identical with Cor. No. 3, aforesaid Survey No. 1690, Lulloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south 75° 06′ west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

IV.

On said March 20, 1908, plaintiffs' predecessors in interest, by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners, made a valid location of a gold placer mining claim commonly known as "L Association," situated on Fish Creek, a tributary of the Little Chena River, in the Fairbanks Recording Precinct, Territory of Alaska, which said claim was more particularly described, as follows:

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Beginning at Corner No. 1, which is situated 1300 feet northeast of the junction of Fairbanks and Fish Creek, and is common with the southwest corner of Frost Claim, M.S. 1690; thence in a southwesterly direction approximately 550 feet to Corner No. 2; thence in a southwesterly direction approximately 1350 feet to Corner No. 3; thence in a northwesterly direction approximately 550 feet to Corner four; thence in a northwesterly direction approximately 1280 feet to Corner No. 5; thence in a southwesterly direction approximately 1450 feet to Corner No. 6; thence in a southeasterly direction approximately 1450 feet to Corner No. 7; thence in a northeasterly direction approximately 660 feet to [58] Corner No. 8; thence in a southeasterly direction approximately 950 feet to Corner No. 9; thence in a northeasterly direction approximately 2100 feet to Corner No. 10; thence in a northeasterly direction approximately 1350 feet to Corner No. 11; thence in a northwesterly direction approximately 1300 feet to Corner No. 1, initial post and place of beginning. Said claim is a creek claim situated below discovery.

Thereafter plaintiffs Gustaf Soderblom, Walter Jensen and United States Smelting Refining and Mining Company amended the location of said L. Association and cast off excess acreage therein, and the description of said claim and the boundaries thereof as so amended is shown on Mineral Survey No. 2153, plaintiffs' Exhibit No. K herein, and is described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below whence Mineral Monument No. 845 bears north 15° 55′ west 5785.57 feet. No other bearing available: thence south 57° 00′ west 1452.40 feet to Cor. No. 2; thence south 37° 50′ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south 35° 13′ east 622 feet; thence north 61° 13′ east 636.10 feet to Cor. No. 4; thence south 37° 10′ east 716.40 feet to Cor. No. 5; thence north 66° 15′ east 3141.40 feet to Cor. No. 6; thence north 25° 19′ west 1321.35 feet to Cor. No. 7; thence south 60° 07′ west 565.30 feet to Cor. No. 8; thence south 60° 07′ west 565.30 feet to Cor. No. 8; thence south 59° 07′ west 1393.80 feet to Cor. No. 9; thence north 52° 48′ west 534.30 feet to Cor. No. 10; thence north 57° 17′ west 622.30 feet along line 3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of beginning.

Ever since March 20, 1908, plaintiffs and their said predecessors in interest have been and were at the time of the filing of the complaints in said actions, and are now the owners and are entitled to the possession, subject only to the paramount title of the United States, of said The Snow Shoe Fraction and said L Association placer mining claims, and were in possession thereof.

During each annual labor year beginning with the year the owner or owners of said The Snow Shoe Fraction and said L Association have performed the annual labor required by law upon each

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of said placer mining claims, or have filed valid notices of intention to hold said mining [59] claims without performing said annual labor, pursuant to acts of Congress suspending or waiving such performance in accordance with such acts.

VII.

On July 31, 1941, defendant's predecessor in interest attempted to locate a placer mining claim known as "The Saturn," and on October 29, 1941, defendant's predecessors in interest attempted to locate placer mining claims called the "Scorpion Association" and "Jupiter Association," all of said claims being more particularly described in United States Mineral Survey No. 2105. Said Scorpion Association included within its boundaries the whole of said The Snow Shoe Fraction, as hereinabove last described, and said Saturn Claim and Jupiter Association included a large portion of said L Association as hereinabove last described.

The area in conflict between the claims of the plaintiffs and said The Saturn, Scorpion Association and Jupiter Association of the defendant was not unoccupied and unclaimed mineral land and was not a part of the public domain at the time of defendant's attempted locations, but was the property of Plaintiffs, subject only to the paramount title of the United States.

VIII.

There was no evidence in this case as to the citizenship of the Defendant Emma Grace Lowe.

IX.

That the reasonable sum to be allowed the Plaintiff for attorney's fees herein is the sum of $500.00.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court finds:

1. Plaintiffs, First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased Walter Jensen and United States Smelting Refining and Mining Company are the owners, subject only to the paramount title of the United States, of that certain placer mining claim known as L. Association situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks Precinct, Territory of Alaska, which said claim is more particularly described as follows: [60]

> Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below, whence Mineral Monument No. 845 bears north 15° 55′ west 5785.57 feet. No other bearings available; thence south 57° 00′ west 1452.40 feet to Cor. No. 2; thence south 37° 50′ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south 35° 13′ east 622 feet; thence north 61° 13′ east 636.10 feet to Cor. No. 4; thence south 37° 10′ east 716.40 feet to Cor. No. 4; thence south 37° 10′ east 716.40 feet to Cor. No. 5; thence north 66° 15′ east 3141.40 feet to Cor. No. 6; thence north 25° 19′ west 1321.35 feet to Cor. No. 7; thence south 60° 07′ west 565.30 feet to Cor. No. 8; thence south 59° 07′ west 1393.80 feet to Cor. No. 9; thence north 52° 48′ west 534.30 feet to Cor. No. 10; thence north 57° 17′ west, 667.0 feet to Cor. No. 11; thence north 57° 07′ west 622.30 feet along line

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3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of beginning.

2. Plaintiff United States Smelting Refining and Mining Company is the owner, subject only to the paramount title of the United States, of the certain fraction of land being a placer mining claim known as "The Snow Shoe Fraction," situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north 24° 33′ west 7112.24 feet; thence south 50° 26′ east 181.90 feet to Cor. No. 2, identical with Cor. No. 8, L Association; thence north 60° 07′ east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south 75° 24′ west along line, Survey No. 1690, Luloo 360.20 feet to Cor. No. 1690, Luloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south 75° 06′ west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

3. Defendant has no estate or right, title or interest whatever in or to said The Snow Shoe Fraction or said L Association placer mining claims, or the land embraced therein, or any part thereof.

4. Plaintiff United States Smelting Refining and Mining Company is entitled to a judgment quieting its title to said The Snow Shoe Fraction placer mining claim against the defendant, and is entitled to the sole and executive possession thereof, and said plaintiffs, First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased, Walter Jensen, and United States Smelting Refining and Mining Company, are entitled to a judgment quieting their title to said L Association placer [61] mining claim against the defendant, and are entitled to the sole and exclusive possession thereof.

5. Said defendant is entitled to take nothing by the answers she has filed herein.

6. Plaintiffs, and each of them, are entitled to their costs of suit incurred herein, including a reasonable attorneys fee, to-wit: the sum of $500.00.

Let judgment be entered accordingly.

Dated this 1st day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 1, 1948. No. 36, Pages 185-188.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 1, 1948. [62]

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In the United States District Court for the Territory of Alaska, Fourth Judicial Division

No. 5493

UNITED STATES SMELTING REFINING & MINING COMPANY, a Maine Corporation,

Plaintiff,

vs.

EMMA GRACE LOWE,

Defendant.

No. 5494

GUSTAF SODERBLOM, WALTER JENSEN and UNITED STATES SMELTING REFINING & MINING COMPANY, a Maine Corporation,

Plaintiffs,

vs.

EMMA GRACE LOWE,

Defendant.

DECREE QUIETING TITLE

The above-entitled actions having been consolidated for purposes of trial and judgment, came on regularly for trial on the 6th day of August, 1947, and succeeding days, before the Honorable Harry E. Pratt, Judge of the above entitled court, sitting with an advisory jury, Southall R. Pfund, Esq., and Charles J. Clasby, Esq., appearing for the plaintiffs, and Bailey E. Bell, Esq., appearing for the defendant, and evidence, both oral and documentary, having been introduced in behalf of the

respective parties hereto, and the causes having been submitted to the advisory jury and the jury having rendered its advisory verdict in favor of the plaintiffs, and against the defendant, and the causes having been finally submitted to the court for decision on the 15th day of August, 1947, [63] upon briefs to be filed by the respective parties, and the court having heard and considered the evidence, the arguments and briefs of counsel and the advisory verdict of the jury, and having fully considered the same and being fully advised in the premises, and having confirmed as correct and adopted the findings of fact of the advisory jury in its verdict herein, and made and filed herein its findings of fact and conclusions of law, and good cause appearing therefor;

Now, therefore, it is Ordered, Adjudged and Decreed as follows:

1. That plaintiff, Gustaf Soderblom, during his lifetime, and First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased, thereafter, Walter Jensen and United States Smelting Refining and Mining Company were, during all of the times mentioned herein and in the complaints on file herein, and now are the owners, subject only to the paramount title of the United States, and are entitled to the possession of that certain placer mining claim known as "L Association," and the land embraced therein, situated on Fish Creek, a tributary of Little Chena River, in the Fairbanks Recording Precinct,

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Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below, whence Mineral Monument No. 845 bears north 15° 55′ west 5785.57 feet. No other bearings available; thence south 57° 00′ west 1452.40 feet to Cor. No. 2; thence south 37° 50′ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south 35° 13′ east 622 feet; thence north 61° 13′ east 636.10 feet to Cor. No. 4; thence south 37° 10′ east 716.10 feet to Cor. No. 5; thence north 66° 15′ east 3141.40 feet to Cor. No. 6; thence north 25° 19′ west 1321.35 feet to Cor. No. 7; thence south 60° 07′ west 565.30 feet to Cor. No. 8; thence south 59° 07′ west 1393.80 feet to Cor. No. 9; thence north 52° 48′ west 534.30 feet to Cor. No. 10; thence north 57° 17′ west 667.0 feet to Cor. No. 11; thence north 57° 07′ west 622.30 feet along line 3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of [64] beginning.

2. That plaintiff United States Smelting Refining and Mining Company was during all of the times mentioned herein and in the complaints on file herein, and now is the owner, subject only to the paramount title of the United States, and is entitled to the possession of that certain placer mining claim known as "The Snow Shoe Fraction," and the land embraced therein, situated on Fish Creek, a tributary of Little Chena River, in the Fairbanks Recording Precinct, Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north 24° 33' west, 7112.24 feet; thence south 50° 26' east 181.90 feet to Cor. 2, identical with Cor. No. 8, L Association; thence north 60° 07' east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south 75° 24' west along line, Survey No. 1690, Luloo 360.20 feet to Cor. No. 4, identical with Cor. No. 3, aforesaid, Survey No. 1690, Luloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south 75° 06' west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

3. That the claims of the defendant, Emma Grace Lowe, and all who claim title under her in and to said real property, to wit, said The Snow Shoe Fraction and said L Association, are without any right whatever, and said defendant has no right, title, interest, claim or estate whatever in, to, or upon the said placer mining claims, or any part thereof, and said defendant and all persons claiming under her are hereby enjoined and debarred from claiming or asserting any estate, right, title, interest in or claim or lien upon said placer mining claims, or any part thereof.

4. That plaintiffs, and each of them, have and recover from said defendant the costs of suit herein expended and taxed in the sum of.....dollars ($.....), including [65] a reasonable attorneys'

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fee, hereby fixed by the court at five hundred and no/100 dollars ($500.00).

Dated this 6th day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 6, 1948. No. 36, Page 199-200.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 6, 1948. [66]

[Title of District Court and Causes Nos. 5493-94.]

NOTICE OF APPEAL

The name and address of Appellant is: Emma Grace Lowe, of Fairbanks, Alaska.

Name and address of Appellant's Attorney is: Bailey E. Bell, of Fairbanks, Alaska.

Name of Appellees are: First National Bank of Fairbanks, Executor of the estate of Gustaf Soderblom, Walter Jensen, and United States Smelting Refining and Mining Company, a Maine corporation.

The address of all the defendants is Fairbanks, Alaska.

The names and addresses of the Attorneys of Record for Appellee are: Southall R. Pfund, F. E. Building, Fairbanks, Alaska, and Charles J. Clasby of the law firm of Collins and Clasby, Fairbanks, Alaska.

The actions as consolidated are adverse suits

to determine the right of possession to mining claims and to quiet title to the properties described in the complaints filed in each of the above-entitled causes.

The actions were and are based upon the general mining laws [67] of the United States as affected by the amendments affecting Alaska and the general laws of Alaska, and especially the construction of Sections 381, 384, and 387 of Title 48, U.S. C.A., and Chapter 297, United States Statutes at Large, 52, being the act of May 31, 1938, that the trial court held repealed by implication, Section 384 of Title 48, U.S.C.A., known as the Wasky Act.

It is contended by the Defendant that the Court erred in overruling her demurrer in cause No. 5493. It is further contended by the Defendant that the court erred in not sustaining her objections to the introduction of any evidence on the part of the Plaintiff in cause No. 5493 and 5494, which motion was made at the commencement of the trial.

The Court erred in not granting the Defendant's motion for a mistrial of this consolidated case for the reason that during a recess two of the jurors were examining the maps of the principal party of this law suit and the Vice President and General Manager of the plaintiff company was up there whispering to them. And for the further reason that we have no knowledge of what this executive officer of the plaintiff company said to the jurors and his statements are not in the record and we had no chance to cross examine. And this is espec-

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ially true since the Court stated, T. of R., Page 104:

The Court: I heard everything Mr. Earling said, I am sure, and all it was was to point out very obvious facts that were on the map, which showed where the claims in controversy were, and the jurors and I were trying to find out where they were. He merely pointed out on the map where they were, in an entirely innocuous way. I will deny the motion.

Mr. Bell: Exception.

The Court erred in overruling the Defendant's motion for non-suit in cause No. 5493 and the same motion in cause No. 5494, as shown in Page 147 of the transcript by the Court Reporter. And the Court's ruling thereon was erroneous as is shown in the proceedings commencing on Page 147, and to, and including, Page 156, wherein the Court overruled Defendant's motions and granted the Plaintiff the right to reopen and put [68] in additional evidence.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment for non-suit of Plaintiff's action in Case No. 5493, and denying Defendant any recovery, made at the time Plaintiffs rested their case.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action, and to render judgment for non-suit of Plaintiff's action in Case No. 5494, made at the time the Plaintiffs rested their case, all as shown in the

transcript of testimony and proceedings made by the official Court Reporter, shown on Pages 242, 243, 244, and 245.

Defendant contends that the Court erred in not sustaining her motion for judgment Non Obstante Veredicto filed in said cause immediately following the verdict of the jury, which filing was entered on August 15, 1947.

The Court erred in refusing to give Defendant's offered instructions No. 1, 2, 3, 4, 5, 6, and 7, or any of them.

The Court erred in giving instructions which did not clearly state the law affecting the cases being tried, but were contrary to the law, and the controlling decisions affecting this jurisdiction and these cases.

The Court erred in giving instructions Nos. Subdivision D of Instruction No. 1; Subdivision H of Instruction No. 1 and the whole of Instructions No. 3, 4, 6, 7, 9 and 10 which instructions were specifically objected to and exceptions granted the Defendant thereon.

That the verdict of the jury as rendered was unconscionable, was contrary to all of the evidence, was not supported by any competent evidence, was contrary to the great weight of the evidence.

That the Court rendered judgment in this case on the 6th day of April, 1948, in favor of the Plaintiff and denied the Defendant any recovery whatsoever, which was error on the part of the Court.

On the same day and date, the Court rendered judgment for the Plaintiff and against the Defendant for an attorney's fee without any evidence

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whatsoever having been introduced or offered for the purpose of fixing an attorney's fee or the amount thereof. [69]

And that the judgment was error in that it was not based upon any evidence or upon any pleading authorizing the rendering of judgment for an attorney's fee.

I, Grace Lowe, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the judgment above-mentioned on all of the grounds set forth above, and the following grounds:

I.

The Court erred in not sustaining the Defendant's motion for a non-suit in each of the above causes of action as consolidated.

II.

The Court erred in not instructing the jury to return a verdict for the Defendant in each separate case.

III.

The Court erred in sustaining the Plaintiff's objections to competent questions, thereby preventing the introduction of competent, material and relevant evidence.

IV.

The Court erred in refusing the offers of the Defendant to prove competent, material and relevant facts.

V.

The Court erred in admitting incompetent, irrelevant and immaterial evidence on the part of the

Plaintiff in each of the cases over the objections of the Defendant and thereby prevented the Defendant from having a fair trial.

VI.

The Court erred in giving instructions to the jury which prevented the Defendant from having a fair trial.

VII.

The Court erred in refusing to give the Defendant's offered instructions.

VIII.

The verdict, as returned into Court, was arrived at unlawfully and [70] was based on prejudice and misconduct on the part of certain jurors, was clearly against the great weight of the evidence and was not sustained by any competent evidence.

IX.

Errors of law occurring at the trial on the part of the Court.

X.

Error of the Court in not instructing the jury to render a verdict for the Defendant.

XI.

Error of the Court in not sustaining the Defendant's motion for a non-suit in each of the cases.

XII.

Error of law whereby the Court held that Section 384, Volume 48, U.S.C., Known as the Wasky Act, had been repealed by implication by the Act of 1938, same being Chapter 297, United States Statutes at Large, 52, found on Page 588.

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XIII.

Error of the Court in finding and signing Findings of Fact, Numbers 1, 2, 3, 4, 7, 8, and 9.

XIV.

Error of the Court in finding and signing Conclusions of Law, Numbers 1, 2, 3, 4, 5, and 6.

XV.

Error of the Court in rendering judgment in in Cause No. 5493 for the Plaintiff and denying the Defendant any recovery.

XVI.

Error of the Court in rendering judgment in Cause No. 5494 in favor of the Plaintiffs and against the Defendant, Emma Grace Lowe, and denying the Defendant any recovery.

XVII.

Error of the Court in rendering judgment for Attorney's fees in favor of the Plaintiff and against the Defendant.

Respectfully submitted,

/s/ EMMA GRACE LOWE,
Defendant.

By /s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948. [71]

[Title of District Court and Causes Nos. 5493-94.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named Defendant, considering herself aggrieved by the judgment of this Court made and entered herein on the 6th day of April, 1948, and the orders of the Court and the rulings of the Court as set out in the Minutes and the Transcript of the Record and in the Assignment of Errors, said judgment being in favor of the Plaintiff when she believes it should be in her favor, and in the overruling and failing to sustain her motion Non Obstante Veredicto, and for allowing the Plaintiffs an attorneys' fee and judgment for costs.

The Defendant having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States setting in San Francisco, California for all of the reasons specified and set forth in the record in this case and in her Assignment of Errors and the Notice of Appeal filed herein does respectfully pray that said appeal may be allowed and that a transcript of records, proceedings and papers upon which said judgment was based and entered be duly authenticated by the Clerk of this Court and sent to the United States [72] Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and that said Defendant does further pray that said judgment afore-mentioned be corrected, set aside, reversed, a new trial ordered, and proper judgment entered for the Defendant herein, and

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that the Court fix the amount of Appeal Bond and Supersedeas Bond to be filed herein.

Dated at Fairbanks, Alaska, this 9th day of April, 1948.

/s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948. [73]

[Title of District Court and Causes Nos. 5493-94.]

ASSIGNMENT OF ERRORS

Comes now Emma Grace Lowe, Defendant in each of the above-denominated and consolidated cases, and sole and only Defendant in each of said cases and for Assignment of Errors in this consolidated case alleges and states:

* * * *

[74]

V.

The Court erred in overruling the Defendant's motion for non-suit in Case No. 5493 when the Plaintiff rested.

VI.

The Court erred in granting the Plaintiff the right to reopen their case after they had rested in Case No. 5493.

VII.

The Court erred in overruling Defendant's motion for non-suit in Case No. 5494, as shown on Page 147 of the transcript by the Court Reporter.

VIII.

The Court further erred in permitting the Plaintiffs to reopen their case for the purpose of offering additional evidence after they had rested and after the motion for non-suit had been made.

IX.

The Court erred in overruling Defendant's motion for non-suit at the close of all of the Plaintiffs' evidence after they had reopened and offered some additional evidence that still failed to prove a cause of action in favor of the Plaintiffs and against the Defendant, entitling them to recovery in Case No. 5493.

• • • • [75]

XI.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment of non-suit of Plaintiff's action in case No. 5493 at the close of all of the evidence.

XII.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment granting a non-suit of Plaintiffs' action in case No. 5494.

XIII.

The Court erred in not sustaining Defendant's motion for judgment Non Obstante Veredicto filed in said cause immediately following the verdict of the jury, which motion was filed and entered on August 15, 1947.

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XIV.

The Court erred in refusing to give Defendant's offered instructions No. 1, 2, 3, 4, 5, 6 and/or 7, or any of them.

XV.

The Court erred in giving instructions to the jury which did not clearly state the law affecting the cases being tried together, but said instructions were contrary to the law and the controlling decisions affecting this jurisdiction and this case.

XVI.

The Court erred in giving instructions Subdivisions (d) and (h) of No. 1 and the whole of No. 3, 4, 6, 7, 9, and 10, which instructions were specifically objected to on the grounds that they were contrary to the law and did not clearly state the law affecting these cases, and exceptions were granted to the Defendant on each and every one of said instructions.

XVII.

The Court erred in sustaining Plaintiffs' objections to competent, relevant, and material evidence throughout the entire proceedings.

XVIII.

The Court erred in refusing the offers to prove made by the Defendant [83] out of the presence of the jury as are shown in the transcript of records and proceedings had in open Court, filed in this cause and hereby made a part of this Assignment of Errors as fully as if set out herein in full.

XIX.

The Court erred in permitting the introduction of incompetent, irrelevant, immaterial, and prejudicial evidence over the objection of the Defendant, all as is shown by the Court Reporter's transcript filed herein and made a part of this Assignment of Errors as fully as if set out herein in full and attached hereto.

XX.

The Court erred in accepting and being guided by the verdict of the jury as rendered which was unconscionable, was given at a time that the jury was biased and prejudiced against the Defendant, and was contrary to all of the evidence; was not supported by competent evidence; was contrary to the great weight of evidence.

XXI.

That the Court erred in rendering the judgment that he did in this case on the 6th day of April, 1948, in favor of the Plaintiff in both cases and denied the Defendant any recovery whatsoever in either, and that said judgment was not supported by any competent evidence, was contrary to the evidence, and was contrary to the great weight of the evidence.

XXII.

That the judgment rendered as above-mentioned was based upon a wrongful construction of law in which the Court held that the Act of May 31, 1938, by the Congress of the United States, which is found in United States Statutes at Large, 52, and being Chapter 297, repealed Sections 381, 384, and

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387 of Title 48, U.S.C.A., and especially 384, which is referred to as the Wasky Act.

XXIII.

The Court further erred in rendering a judgment for the Plaintiff against the Defendant for an attorney's fee without any evidence whatsoever having been introduced or offered for the purpose of fixing an attorney's fee, or as to the services rendered, or what a reasonable fee would be, or to determine [84] the amount thereof, and this is especially true since the pleadings do not ask for attorney's fees and the judgment granting attorney's fees was an error of law and an error of fact.

XXIV.

Errors of law occurring at the trial on the part of the Court, all as shown by the above-mentioned certified transcript of the records and proceedings had in open Court and made by the Court Reporter.

XXV.

Error of the Court in not instructing the jury to render a verdict for the Defendant in Case No. 5493.

XXVI.

Error of the Court in not instructing the jury to render a verdict for the Defendant in Case No. 5494.

XXVII.

Error of the Court in finding and signing the following numbered findings of fact, to-wit: I, II, III, IV, VII, VIII, and IX.

XXVIII.

Error of the Court in finding and signing conclusions of law Numbers 1, 2, 3, 4, 5, and 6.

XXIX.

Error of the Court in rendering judgment in the above-entitled consolidated cases for the Plaintiff and denying the Defendant any recovery.

* * * * [85]

L.

The Court erred in not sustaining the Defendant's motion for non-suit at the close of the Plaintiff's evidence in Cause No. 5493, Tr. 147.

LI.

The Court erred in not sustaining Defendant's motion for non-suit at the close of all of the evidence as to Cause No. 5494, Tr. 147, to and including 157.

* * * * [99]

LVII.

The Court erred in the following ruling shown of Page 190, Tr:

Mr. Bell: I started to say to you what my contention was.

The Court: You read that and gave me your position this morning.

Mr. Bell: Well, it is the Statute of Alaska.

The Court: That Statute was repealed. The Waskey Act was repealed in 1938. Also, it didn't apply to a case of this sort. The presumption is that a man works a mining claim continuously. Anyone claiming he didn't do [100] the assessment work has the burden of proving it.

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Mr. Bell: I wanted that in the record to show my position that the statute is still valid. Now, your Honor, why I say I have a right to examine even further, even against that ruling on labor, is because he testified to certain labor he had performed out there in chief, yesterday. He testified to sinking three different shafts, and I wanted to know when he sank those shafts and if he ever did any other work there.

The Court: Objection is sustained.

Mr. Bell: Exception.

* * * *

[101]

LXX.

The Court erred in overruling the Defendant's demurrer and motion for non-suit at the close of the Plaintiff's evidence as follows; to-wit:

Mr. Bell: Comes now the Defendant, Grace Lowe, in cause Number 5493, the case affecting the "Snow Shoe Fraction", and moves the Court to make an order to sustain a demurrer to the evidence, and to make an order of non-suit for all of the reasons that I will hereinafter state.

Comes now the Defendant, Grace Lowe, and moves the Court to sustain a demurrer to the evidence in cause Number 5494, and to make an order of non-suit as to the Plaintiffs' cause of action, and for the grounds that the motion states; first, that the Plaintiffs have not, in either case, proven the allegations of their complaint; and the second, they have not proven a valid location of the ground; third, they have not proven the filing of a valid location; fourth, they have not proven pos-

session of the ground; fifth, they have not met the Statute in that it requires the filing of affidavits of annual labor, and since they did not file the affidavits of annual labor, the burden of proof under the Statute is upon them to prove the labor was performed; for the further reason that the attempted amended location that they introduced since the resting of the case and the reopening, is nothing more than a relocation, and to prove a relocation, they had to prove an abandonment of the former locators, and they can not recognize by the instruments the former location, and then relocate in the name of the United States Smelting Refining and Mining Company, who was not a party to the original location; and for the further reason they have failed to establish a cause of action in favor of the Plaintiffs.

* * * * [104]

C.

The Court erred in the following proceedings:

The Court: This morning there was evidence tendered by Grace Lowe as to years in which no affidavits of annual labor or notices of desire to hold without annual labor had been filed. Over objection, I permitted it to go in, thinking it had some probative value. Upon reflection, I believe I was mistaken, and that it has no probative value. Therefore, I will entertain any appropriate motion.

Mr. Pfund: I move that it be stricken, in conjunction with the motion to strike at the time.

Mr. Bell: I object. It is a question of fact that

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it be determined by the Court under the Waskey Act that was in full force and effect all during the years that she testified about. She only testified—nothing beyond '38—1938, from the staking, up to 1938.

The Court: I will sustain the motion, and it is stricken.

Mr. Bell: Exception.

* * * *

[127]

CII.

The Court erred in the following proceedings:

["Note: Then follows the testimony of Mr. Everett E. Smith, which is set out in this assignment in identical form and in exactly the same words as appear in Exception No. 3 in the Bill of Exceptions and hereafter printed. Such material is a duplication of the identical material appearing in Exception No. 3 and for that reason appellant considers its inclusion unnecessary as a part of the printed record."]

* * * *

[128]

CXXI.

The Court erred in admitting Identification No. 26, Exhibit "X".

["Note: Then appears quotations from the testimony showing the offer of this exhibit in evidence, the objection thereto, and the court's ruling thereon in the identical language that appears and is quoted in Exception No. 8, pages 198 and 199 of the transcript of record. Such material is printed as a part of said exception and the same quotations from the testimony which appear in this assign-

ment would be a mere duplication thereof and appellant has not caused it to be printed for such reason."]

* * * * [145]

CXXIII.

The Court erred in admitting Identification 27, Exhibit "Y".

["Note: Then follows quotations from the transcript of testimony showing the offer of this exhibit, the objection thereto and the court's ruling thereon and argument of counsel in connection therewith. The same and identical material appears and is quoted in the bill of exceptions, Exception No. 8, which is printed as a part of this record, on page 200, transcript of record. For such reason appellant does not consider it necessary to print the same material here."]

* * * * [148]

CXXIV.

The Court erred in admitting Identification "28".

["Note: Then follows quotations from the transcript of testimony showing the offer of this identification in evidence, the objection thereto, the argument of counsel in connection therewith, the court's ruling thereon, and its admission as plaintiff's Exhibit Z. Such quotations are identical with the quotations appearing in said Exception No. 8 of the Bill of Exceptions and printed in connection therewith, pp. 200 to 202, transcript of record. For such reason appellant has not caused this mat-

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ter to be printed, as it is a duplication of the same and identical matter appearing in said exception."]

* * * * [149]

CXXIX.

Error of the Court in inserting in Paragraph 8 of the Findings of Fact the following:

"There was no evidence in this case as to the citizenship of the Defendant, Emma Grace Lowe, at any time." Since this matter was never questioned in the pleadings, the evidence or a suggestion of amendment.

CXXX.

Error of the Court in inserting Paragraph 9 of the Findings of Fact the following:

"That the reasonable sum to be allowed the Plaintiff for attorneys fees herein is the sum of $500.00."

CXXXI.

Error of the Court in overruling all of the rest, residue and remainder of the objections of the Defendant to Plaintiffs proposed Findings of Fact and Conclusions of Law.

Wherefore, Defendant prays that said judgment be set aside, reversed, modified, and a correct judgment rendered in accordance with law, and that the Court hold that the so-called Waskey Act referred to in the proceedings has not been repealed by implication and for a judgment applying the prevailing law to the evidence as given and as offered and rejected in this case, and for such other and further relief as the Court may deem just and proper, and for all costs of appeal, including a

reasonable attorney's fee for Defendant's attorneys.

/s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948. [152]

[Title of District Court and Causes Nos. 5493-94.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF APPEAL BOND

Now, on this 10th day of April, 1948, the same being one of the days of the General April, 1947 term of this Court, this cause came on regularly to be heard upon the petition of the Defendant in each of the above-entitled, consolidated cases, Emma Grace Lowe, for the allowance of an appeal in behalf of the said Defendant from the final judgment entered in said cause on the 6th day of April, 1948, and also fixing the amount of appeal bond on said appeal and the place of hearing of said appeal, and the said Court being fully advised in the premises, finds that the amount of the appeal bond should be $250.00, Now, Therefore,

It Is Hereby Ordered That the appeal of said Defendant from the final judgment entered herein on the 6th day of April, 1948, and all judgments, orders, and rulings as are set forth in the Assignment of Errors filed herein, be, and the same is allowed, to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified

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transcript of the record, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said judgment appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause [153] docketed on or before 60 days from this date, to be heard at San Francisco, California.

It Is Further Ordered That the amount of the appeal bond be, and is hereby, fixed at the sum of $250.00; said bond to be submitted and approved by the undersigned Judge of this Court.

Done in Chambers at Fairbanks, Alaska, on this 10th day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 9, 1948. No. 36, Page 208-209.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 10, 1948. [154]

[Title of District Court and Causes Nos. 5493-94.]

BILL OF EXCEPTIONS

Be It Remembered that on the 5th day of August, 1947, at Fairbanks, in the Fourth Judicial Division of the Territory of Alaska, the above entitled causes (which had been consolidated for trial) came on regularly for trial in said District Court, before the Hon. Harry E. Pratt, Judge,

the plaintiffs appearing with their witnesses and by their attorneys Southall F. Pfund and Charles J. Glasby, and the defendant appearing in person and with her witnesses and by her attorney Bailey E. Bell, whereupon an advisory jury was duly selected, impanelled and sworn by direction of the Court to try the said combined cases and the trial of said cases continued from day to day until the 14th day of August, 1947. In connection with said trial the following proceedings were had and taken, to-wit: [155]

EXCEPTION No. 1

That during the trial of said causes and the presentation of plaintiffs' case in chief, plaintiffs introduced no evidence regarding the performance of any annual labor and assessment work, or the filing of any proofs of labor or suspension notices on either of the claims involved herein, the L Association or Snow Shoe Fraction, and the Court denied and refused to permit efforts on the part of the defendant to show that the assessment work was not done and that no proofs of labor or suspension notices were filed during certain years between 1908 and 1938, and excluded certain exhibits offered by the defendant in that regard upon the grounds that such evidence was not proper cross-examination and was matter of affirmative defense, that the Waskey Act had been repealed in 1938; that the presumption now was that a man works a mining claim continuously, (p. 190, Tr. of Testimony), whereupon at the close of plaintiffs' testi-

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mony, the following motion was submitted by the defendant:

"Mr. Bell: Comes now the Defendant, Grace Lowe, in cause Number 5493, the case affecting the "Snow Shoe Fraction", and moves the Court to make an order to sustain a demurrer to the evidence, and to make an order of non-suit for all of the reasons that I will hereinafter state.

"Comes now the Defendant, Grace Lowe, and moves the Court to sustain a demurrer to the evidence in cause Number 5494, and to make an order of non-suit as to the Plaintiffs' cause of action and for the grounds that (o) the motion states; first, that the Plaintiffs have not, in either case proven the allegations of their complaint; * * * * fifth, they have not met the Statute in that it requires the filing of affidavits of annual labor, and since they did not file the affidavits of annual labor, the burden of proof under the Statute is upon them to prove the labor was performed; * * * * and for the further reason they have failed to establish a cause of action in favor of the Plaintiffs."

(Mr. Bell then presented his argument and citations on the motion; and Mr. Pfund presented his argument and citations.)

"The Court: I think the law is well established. * * * * But when it comes to showing assessment work, I don't think they have to. I think the burden of proof of showing it wasn't done lies upon the person asserting it.

"Now, the Waskey Act said, if you didn't file

location certificates, the burden should be shifted. There has been a good deal of questioning that, but not—from that point of view—but entirely from the point of view when the [156] Waskey Act was repealed in '38. I take the view that the burden is still on the defendant. Perhaps it is under the General Laws, too, but the Waskey Act being repealed, it certainly is, and I think by this time the Plaintiff has definitely shown claims which conform to the proper pleading in this case, so all told, I deny the motion.

"Mr. Bell: Do you deny it in each?

"The Court: I deny it in each.

"Mr. Bell: Please let the record show an exception to the defendant."

(Tr. of Testimony, pp. 242 to 245.)

EXCEPTION No. 2

Following the proceedings recited in Exception No. 1, and during the presentation of defendant's evidence, the defendant Grace Lowe was called as a witness on her own behalf and having been duly sworn was at first permitted to testify over objection of the plaintiffs' counsel that she had examined the records in the office of the United States Commissioner and ex officio recorder of the mining district in which the L Association and the Snow Shoe Fraction claims are situated as of three days before the commencement of the trial, that from 1908 to 1915 there were no affidavits of labor or claims of exemption on file for either claim, and and as regards subsequent years there were no af-

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fidavits of labor or intention to hold filed for 1920, 1921, 1925, 1926 and 1927, and the intention to hold for 1917 upon the L Association was filed for by Billy Sullivan alone, or Gus Soderblom, she could not recall which. The witness further testified that she did not believe there was any intention to hold filed for the years 1918 and 1919, and no affidavits of labor for the years 1934 or 1935. After having admitted said testimony on the morning of August 12, when the Court reconvened, at 2 p.m. after the noon recess, the following proceedings were had:

"The Court: This morning there was evidence tendered by Grace Lowe as to years in which no affidavits of annual labor or notices of desire to hold without annual labor had been filed. Over objection, I permitted it to go in, thinking it had some probative value. Upon reflection, I believe I was mistaken, and that it has no probative value. Therefore, I will entertain any appropriate motion. [157]

"Mr. Pfund: I move that it be stricken, in conjunction with the motion to strike at the time.

"Mr. Bell: I object. It is a question of fact that it be determined by the Court under the Waskey Act that was in full force and effect all during the years that she testified about. She only testified—nothing beyond '38—1938, from the staking, up to 1938.

"The Court: I will sustain the motion, and it is stricken.

"Mr. Bell: Exception."

(Transcript of Testimony, p. 364.)

EXCEPTION No. 3

That during the trial of said causes, and following the proceedings recited in Exceptions Nos. 1 and 2, there was called as a witness on behalf of the defendant one

EVERETT E. SMITH,

who being duly sworn testified as follows:

"Direct Examination

"Questions by Mr. Bell:

"Q. Now, please state your name? A. Everett E. Smith.

"Q. What, if any, official position do you hold in the Fourth Judicial Division of the Territory of Alaska? A. I am United States Commissioner and ex-officio Recorder.

"Q. And as such, do you have in your custody the books and records showing all mining, all exemptions of labor filed for the year 1938, up to the present time? A. Yes, sir.

"Q. Do you also have in your possession the record of all affidavits of labor filed in this mining district from 1908, up to the present time? A. Yes.

"Q. Have you, at my instance and request, made a search of those records to see what exemption claims and what affidavits are—or affidavits of labor, or notices of exemption claims—have been filed from 1908 up to the present time? Did you make that search? A. My search is not complete, due to lack of time.

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(Testimony of Everett E. Smith.)

"Q. How far up is your search? A. At the present time I reached 1928.

"Q. You haven't been able to come on beyond 1928, then? A. Well, I have brought with me to the courtroom the Index records, and those show all of the work, affidavits of labor from approximately 1914 to date.

"Q. So then, with the work that you have done, and the Index record, you are in a position to tell the Court and jury what affidavits of labor have been filed affecting these two places, and what notices of exemptions have been filed, up to and beyond 1941? With the Index, and your search? A. Well, I believe the record will speak for itself.

"Q. Now, then, would you tell us what the record shows for the 'Snow Shoe' claim commencing at 1908, and examine your record or search, and the Index, from then on up [158] to '41, and tell us what dates affidavits of labor were filed, and what dates notices of intentions to hold were filed? That is on the 'Snow Shoe', now. A. I would have to get my record books, because something like that would cover too much from memory.

"Q. Well, do you have your record books here with you? A. Well, I have the Index.

"Q. Can you take the Index and tell the Court and jury what years either of those were filed on the 'Snow Shoe'? A. Well, affidavits of labor also have your intentions to hold, and you couldn't tell right from the Index whether it was an intention to hold, or an affidavit of labor.

(Testimony of Everett E. Smith.)

"Q. But you can tell from your Index whether anything was filed for the year? A. Yes.

"Q. Now, then, first we will have you tell us what years they were filed, and then have you check the records to give us what instrument each was. Now, starting on the 'Snow Shoe', when was the first record of any filing of either the affidavit of labor, or the intention to hold?

"Mr. Pfund: We object, of course, if your Honor please, on the ground it is not the best evidence. It is incompetent, irrelevant and immaterial.

"The Court: The objection will be overruled.

"A. The first affidavit of labor—or this may be a—it is. We would have to look it up in the volume, itself, to get its correct title, but the first indication we have of anything on the 'Snow Shoe' is in 1915.

"Q. 1915? Nothing shown in the record from the date of the filing of the claim, or the mining claim notice, up to 1915, as I understand.

"Mr. Pfund: It is leading and suggestive.

"Mr. Bell: Yes, it is, but I am repeating his statement.

"Q. Is that right? A. As far as I can find out, from my Index.

"Q. Now, then, when is the next filing on the 'Snow Shoe'? A. That was in 1917.

"Q. 1917? A. And that was a joint intention to hold for the 'Snow Shoe' and the 'L Association'.

"Q. Intention to hold? Now, then, what was

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(Testimony of Everett E. Smith.)

next, after 1917, affecting the 'Snow Shoe'? A. Intention to hold in 1918.

"Q. All right. A. for both the 'L' and the 'Snow Shoe'.

"Q. All right. Now, what was the next after that? A. That was in 1919, exemptions from annual labor for both the [159] 'Snow Shoe' and the 'L Association'.

"Q. All right. Then what was the next after that? A. The next after that were two instruments for the assessment year ending July 1, 1923.

"Q. 1923? Did that affect both of them, or was there two instruments there for one? A. No, one was for the 'L Association' and one for the 'Snow Shoe Fraction'.

"Q. One for each? All right, now when was the next? A. That, I believe, is July 1, 1928.

"Q. Nineteen and 28. Now, that is for the 'Snow Shoe Fraction', is it? A. Well, yes, that was for the 'Snow Shoe Fraction'. There was an 'L Association' noted in there, but I don't believe—(interrupted).

Mr. Pfund: Never mind what you believe, please. We object to that testimony, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

"Q. Was there an instrument filed in 1928, in which the 'L Association' was mentioned?

Mr. Pfund: Object on the ground it is leading and suggestive.

The Court: Objection sustained.

(Testimony of Everett E. Smith.)

Mr. Bell: Exception.

"Q. All right, now, was there any more affidavits of labor, or notices of exemption, or anything filed about the 'Snow Shoe Fraction', from then on, up—from '28 on up? A. Yes.

"Q. Please give us the next date? A. The next date was July 1, 1929.

"Q. 1929? A. That is the assessment year ending.

"Q. What was that that was filed? A. In my notes I have 'Snow Shoe', but we have these books —I have the volumes.

"Q. Have you the volumes, and can you check them and get us exactly what each one was? A. Yes.

"Q. Would you do that for us, and how long would it take you to do that? A. Well, I could bring the volumes into court.

"Q. Could you bring them up right away? A. Yes.

"Q. All right. A. For all of these that you have mentioned?

"Q. Well, the ones that you have—every one that was filed. Every instrument that was filed, from 1908 up to 1941. [160] Could you do that then, and how long would it take you to do that? It would really save the time of the court if he will check so that he can testify what the instrument was. A. I would probably have to bring about six volumes.

The Court: About how long would it take you.

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(Testimony of Everett E. Smith.)

Several hours? A. Oh, no, I could bring them up right away.

The Court: How long? A. Ten minutes.

The Court: Our rules provide that the official records of the Recording Office not be brought up here except under special circumstances.

Mr. Pfund: Has the witness prepared certified copies of these instruments to which you referred?

A. I have prepared certified copies of some of these.

Mr. Pfund: Of these about which you are testifying?

A. I believe that I have prepared certified copies of a number of these instruments. Not necessarily all of them. I would have to look in my records.

Mr. Bell: Your Honor, I believe this would be the one time that you would make the exception because certified copies of them over which we do not contend would just be cumbersome in the record.

The Court: You have them—you already have certified copies, do you not?

Mr. Bell: I do have some, and have introduced them.

The Court: Those that you offered in your case?

Mr. Bell: Yes, your Honor. The others are just to show lack of filing.

The Court: If that is the case, if there is no objection to them, that testimony can go in, but

(Testimony of Everett E. Smith.)

if there is objection, I will rule it out with the same ruling I made with regard to Miss Lowe's testimony.

Mr. Pfund: I make that objection, if your Honor please. It is utterly negligent testimony; incompetent, irrelevant and immaterial.

Mr. Bell: Your Honor, we have a Statute that says—both a Territorial Statute and Federal Statute—that says if they filed those, it is prima facie evidence of the work being done. If they don't file them, the burden of proof shifts, and it is upon them to prove they did it. Therefore, we have to prove the years they didn't file them, so that you can properly rule who the burden of proof is on.

The Court: The law that provided that, Mr. Bell, as you well know, was the Waskey Act, and the Waskey Act was repealed in 1936, so there is no Act about the burden of proof. [161]

Mr. Bell: Well, your Honor, we have a Territorial Statute.

The Court: Just a moment. There was a Territorial Act passed in 1933, which followed very much the wording of the Waskey Act, but it only referred to claims that were located thereafter, after '33, and also the repealing of the Waskey Act made it contrary to the Federal Law, so that it would be invalid for that reason, as well as only referring to claims located since '33. Consequently, it became a burden of proof law that is no longer in effect.

Mr. Bell: Well, if your Honor please, may I

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(Testimony of Everett E. Smith.)

clarify the matter to ask you this? Wouldn't the law, the Waskey Act that you have held has been repealed by implication, it would be the law of the land up to the day in the summer of the passing of the 1939 Act, wouldn't it?

The Court: Yes.

Mr. Bell: Now, then, I have up until that time the law of filing these would prevail, wouldn't it?

The Court: No, it is a law of proof, and when the question of proof in court comes up, why then if the law was in effect, the burden of proof would be shifted, but it is no longer in effect, now.

Mr. Bell: Of course you know that is one of the real questions in this case.

The Court: It is a very good question, I will admit.

Mr. Bell: I don't want to annoy you by asking questions that would be surplus under your ruling.

The Court: Perhaps you could do it better to make an offer; state your rights at this time?

Mr. Bell: All right, come around please.

(Whereupon, the following proceedings were had out of the hearing of the jury:)

Mr. Bell: Comes now the Defendant, Grace Lowe, and offers to prove by this witness, if he was permitted to testify that there was no affidavits of labor filed, or intentions to hold, on the 'Snow Shoe' claim, except for the years of 1915, 1917, 1918, 1919, 1923, 1928 and 1929, and 1934. And we offer to show that there was no labor affidavits

filed and no exemptions for labor filed for the years of 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 1937, 1938, 1939, 1940, and that the same would apply to the 'L Association', if he was permitted to testify.

Mr. Pfund: To which we object on the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; does not tend to prove or disprove any [162] of the issues in this case; that the Waskey Act having been repealed and the 1939 Territorial Statute being in conflict with the general mining law after that and during that time, that the evidence offered does not tend to prove or disprove any of the issues, and is for that reason, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Bell: Exception.

(Whereupon, the proceedings were again continued in the hearing of the jury.)

Mr. Bell: I guess that is all, then. I have it all in the record there."

(Whereupon, Mr. Smith was excused as a witness.)"

(Tr. of Testimony, pp. 367 to 376.)

EXCEPTION No. 4

During the trial of these cases, the plaintiffs offered no testimony or evidence regarding the performance or non-performance of the annual labor

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and assessment work upon either of the claims involved in these actions, the L Association and Snow Shoe Fraction, during any of the years prior to the fiscal year beginning July 1, 1938, and offered in evidence no proofs of labor or suspension notices covering any of such years prior to said fiscal year. The defendant offered to prove, as set out in Exceptions Nos. 2 and 3, that no proofs of labor or suspension notices were filed covering either claim prior to the year 1914; and that a proof of labor on the Snow Shoe alone was filed in 1915; nothing was filed for either claim in 1916; the joint intention to hold for the Snow Shoe and L Association was filed in 1917; the joint intention to hold for both claims was filed in 1918; and similar exemptions from annual labor for both were filed in 1919; nothing was filed for 1920 or 1921; two separate instruments, one for the L Association and one for the Snow Shoe Fraction were filed for the assessment year ending July 1, 1923, with the next instrument affecting either claim filed for the year ending July 1, 1928; and that there were no affidavits of labor filed or intentions to hold on the Snow Shoe claim, except for the years 1915, 1917, 1918, 1919, 1923, 1928, 1939 and 1934, and that there were no affidavits of labor [163] filed and no exemptions of labor or suspension notices filed for the years of 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 1937, and 1938, upon the L Association claim. That at the close of all the testimony the defendant moved the

Court to dismiss plaintiffs' cause of action and to render a judgment granting a non-suit of plaintiffs' action in case No. 5493 and an identical motion in case No. 5494, and thereupon requested the Court to instruct the jury to render a verdict for the defendant in case No. 5493 and also requested the Court to instruct the jury to render a verdict for the defendant in case No. 5494, upon the ground, among others, that the evidence and proof and the presumptions arising therefrom established that the said claims (the L Association and Snow Shoe Fraction) were forfeited for failure to perform the assessment work for many years prior to 1938, under the provisions of the Waskey Act, and that plaintiffs had failed to sustain the burden of proof showing the performance of the annual labor and assessment work during such years, as required by such act, which motions and requests the Court denied upon the grounds, among other things, that the said Waskey Act had been repealed as a whole in 1938, and that no rights or presumptions could accordingly arise or be asserted under it, to which rulings the defendant duly excepted.

EXCEPTION No. 5

After the taking of the testimony was completed and in due time and form, the defendant requested the Court, among other things, to instruct the jury as follows:

"INSTRUCTION No. 2

"You are further instructed that by the laws of Alaska, and especially the Act of 1907, there is

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no provision for the resumption of labor and if the claim becomes forfeited for failure to do the annual labor thereon, that said ground immediately becomes open domain and subject to being located by anyone, and the resumption of labor on the part of the original locator or subsequent owners does not revive the claim; and if the original locater or subsequent owners want to protect their interest in said claim they must relocate the claim in the same manner as anyone else would be required to do. [164]

"INSTRUCTION No. 3

"You are further instructed that the laws of Alaska in force and effect in 1908 and in full force and effect at all times thereafter requires that a locater or owner of a mining claim or some other person having a knowledge of the facts may make and file with the said Recorder of the District in which the claim shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars ($100.00) as aforesaid, and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name and number of the mining claim and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making such improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvements and by whom paid, when

the same was not done by the owner. Such affidavit shall be Prima Facie evidence of the performance of such work or making of such improvements, but if such affidavit be not filed within the time fixed by this section, the burden of proof shall be upon the claimant to establish the performance of such annual labor and improvements. And, upon failure of the locater or owner of any such claim to comply with the provisions of this section as to the performance of work and improvements, such claims shall become forfeited and open to claims by others as if no location of the same had ever been made.

"INSTRUCTION No. 6

"You are further instructed that if you find and believe from the evidence that during any year after the location of the two mining claims in question here that the owner thereof failed to do and perform the regular assessment work or cause the same to be done, then and in that event the claim would be forfeited and open to location by anyone who cared to locate on the same. And resumption of labor thereafter by the locaters or their assigns would not be sufficient to hold the ground, and if you find and believe by a fair preponderance of the evidence that between the years of 1908 and 1941 the locaters and their assigns failed or neglected to perform the labor as required by the mining laws of Alaska, then the claim would be forfeited and would be a part of the public domain subject to location, and if you further find that the defendant herein located said ground thereafter, before

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the plaintiff or any of its predecessors in title relocated the same, then the location of the defendant would be justifiable under the law and she would have a right to hold the land the same as if no former location had ever been made."

The Court refused to instruct the jury as requested and did not give the substance of such instructions, or any part thereof, in his charge to the jury, but on the contrary instructed the jury as regards such matters as follows: [165]

PART OF INSTRUCTION I

(d) The laws of Alaska in force in 1908 did not require the recording of any location certificate or notice. So, in the present case, it is not necessary to consider whether or not the location certificates filed conformed to the requirement of the law with reference to location certificates.

(h) Under the evidence in this case and the issues as made up by the pleadings, it is immaterial that the L Association contained within its boundaries as originally marked, acreage in excess of 20 acres for each locator.

INSTRUCTION III

(a) The laws pertaining to annual labor upon the Snow Shoe Fraction and the L Association require that $100 worth of work or improvements be done upon or for the benefit of each said claim for each annual labor year, except in those years in which such law was suspended as to annual labor.

(b) You are instructed that the law does not prescribe the particular kind of labor which is to be performed upon a mining claim, nor in what it shall consist, nor the manner in which it shall be performed. Nor does the law require that it shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. And you are therefore instructed that any labor performed upon a claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine.

(c) The law presumes that when a person has made a valid location of a placer mining claim, he, the locator, will do the annual labor required by law to keep the claim alive. This presumption continues until it is shown by competent evidence that such annual labor was in fact not done.

In this case the defendant, Emma Grace Lowe, has alleged in her answer that during certain annual labor years, the annual labor required by law was not performed upon the claims in controversy herein. The burden of proof is upon said Emma Grace Lowe to prove such allegations, to wit: to prove by a preponderance of the evidence that the annual labor was not done upon one or both of said claims for at least one annual labor year. If there is no evidence as to the annual labor not being done for any annual labor year, you should presume that the work was done and so find. If there is evidence that the annual labor work was not done upon either of said claims for any annual labor year, and if such evidence is equally divided

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or preponderates to the effect that such annual labor was done, you should find that such annual labor was done. If, on the other hand, the preponderance of the evidence shows that such annual labor was not done, you should so find.

INSTRUCTION No. IV

(a) The annual labor years designated by law were as follows: For 1909, up to and including 1919, the calendar years were the annual labor years; for the annual labor years 1920, the period was from January 1, 1920, to and including the first day of July, 1921; for the annual labor year of 1921, the period from July 2, 1921 to noon, July 1, 1922, was designated; thereafter, each annual labor year commenced at noon, July 1. For the annual labor year beginning July 1, 1938, the law provided that work during the annual labor year or work commenced in good faith before noon, September 1, 1939, and prosecuted with reasonable diligence to completion, should be sufficient for the annual labor year of 1938. [166]

Consequently, if you designate work as being done or not being done for a designated annual labor year, it shall be deemed to be that year or the extension thereof as above mentioned.

INSTRUCTION No. VI

You are instructed that you need not consider whether or not annual labor was done by the Plaintiff, or their predecessors in interest, for the calendar year of 1919 and the annual labor year commencing at noon, July 1, 1933, upon said Snow

Shoe Fraction and L Association, as sufficient intentions to hold without annual labor have been filed as to said claims.

INSTRUCTION No. VII

You are instructed that when a valid location of a placer mining claim is once made it vests in the locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes marking its boundaries, or the obliteration or removal from the claim of the location notice posted theron.

INSTRUCTION No. IX

The defendant, Emma Grace Lowe, in this action claims under locations made in 1941. The law in force in Alaska in the year 1941 requires for a valid location of placer mining claims as follows:

a. That the locator of a placer mining claim must make a discovery of gold within the boundaries thereof, such discovery to be as hereinbefore mentioned in Instruction I-C.

b. You are instructed that it is immaterial whether the discovery or the makings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

c. "Sec. 356. Notice of location of placer claim; boundaries. The discoverer of a placer claim shall designate the location as follows:

1. By posting on one of the posts or monuments

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marking the boundaries of the claim a plain sign or notice containing:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The date of the location;

(d) The number in feet in length and width claimed; and

2. By erecting at each corner or angle of the claim substantial monuments or posts not less than three feet in height nor less than three inches in diameter, hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines and by cutting out, blazing or marking the boundary lines so that they can be readily traced."

"Sec. 357. Recording certificate of location. The locator or locators of any lode or placer claim shall, within ninety days after the date of posting the notice of location on the claim, cause such claim to be recorded by filing with the recorder of the recording district in which the claim is located, a certificate of location which shall contain:

(a) The name or number of the claim;

(b) The name of the locator or locators;

(c) The number of feet in length and width of the claim; [167]

(d) The date of discovering and of posting the notice of location;

(e) A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a

knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the certificate of location within ninety days as herein provided shall constitute an abandonment of the claim and the ground shall be open to location; provided, however, that full compliance with the provisions of this section after the ninety day period has elapsed, but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator."

I instruct you that in order to establish a valid location of the Scorpion, Saturn and Jupiter claims, or either of them, the defendant, Emma Grace Lowe, for her principal Evelyn Mahan, must prove by a preponderance of the evidence that she made a substantial performance of each step of location as above set forth.

If the defendant proves a valid location of either of said claims by a preponderance of the evidence, you should so find. On the other hand, if the evidence in the case proves there was no valid location of either of said claims by said defendant, or if the evidence as to the same is equally divided, you should find that such claim or claims was not validly located.

INSTRUCTION No. X

a. You are instructed that the law of Alaska, during the time involved in the matters in controversy in these cases, permitted, but did not require

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the filing of affidavits of annual labor, and that therefore you should not consider a failure to file an affidavit of annual labor as being any evidence that such annual labor was not performed.

b. The law of Alaska above-mentioned, makes an affidavit of annual labor which has been filed within three months of the end of the annual labor year prima facie evidence of the performance of the work therein stated, but if other evidence is introduced on the subject of annual labor or its value for the year covered by the affidavit, you should consider the affidavit and such other evidence and try to arrive at the truth of the matter and find in accordance with the preponderance of the evidence on that subject. [168] To which failure to instruct as requested and the instructions given as aforesaid the defendant duly excepted.

Exception No. 6

Reference is made to Exception No. 4 for a recital of the status of the testimony and offers of proof by the defendant regarding the performance or non-performance of annual labor and assessment work upon said claims (L Association and Snow Shoe Fraction) for the years prior to 1938, the failing to file proofs of labor or notices of suspension. Following the completion of the trial of this case and the return of the jury's verdict, the defendant in due time filed a motion for judgment notwithstanding the verdict upon the ground that the verdict of the jury was contrary to the evidence in that the plaintiffs have not proved the

performance of the annual labor upon said claims for many years as required by law, and that the Court has refused to instruct the jury at all on the contents of the so-called Waskey Act, and that the Court erred in refusing to sustain defendant's motion for dismissal of plaintiffs' cause before submitting it to the jury. This motion, in due course, was denied by the Court, to which ruling the defendant excepted.

Exception No. 7

That following the return of the jury's verdict, the Court requested briefs from counsel for the respective parties, among other things, on the point of the implied repeal of the Waskey Act, and the effect thereof, which matter was then briefed by counsel for the respective parties and in due course the Court rendered a detailed written opinion, holding and declaring, among other things, that the Waskey Act had been impliedly repealed as a whole in 1938, and that no rights or presumptions could now arise or be asserted under it, and directing that plaintiffs' counsel prepare and present forms of Findings of Fact and Conclusions of Law and Decree in conformity [169] with such opinion; that plaintiffs' counsel then submitted proposed forms of Findings and Fact and Conclusions of Law and Decree, quieting title, to which defendant in due time and manner submitted, among others, the following objections:

"VI.

"Defendant objects to plaintiffs' proposed find-

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ing and fact number VI, for the reason that it is not based upon any competent evidence; is contrary to all of the evidence, and is against the clear weight of the evidence in that no proof of performing annual labor, required by law, was ever made in the trial of the case, and that no valid notices of intention to hold said mining claims were proven to have been filed for many years between 1908 and the date of the filing of this case.

"VII.

"Defendant objects to plaintiffs' proposed finding of fact number VII, in that the same does not comply with the evidence; is contrary to the great weight of the evidence, on the contrary the evidence clearly showed that the defendant's predecessor in interest made a genuine valid and complete location of a placer mining claim known as "The Saturn," another known as "Scorpion Association," and another as "Jupiter Association," and at the time of making the location the lands covered thereby were a part of the public domain, was unoccupied and unclaimed mineral land, and that none of the plaintiffs had any interest in the land at that time. Their interest, if any, had been previously forfeited by failure to do the required assessment work and failure to properly file affidavits in support thereof, or in lieu thereof.

"IX.

"Defendant objects to plaintiffs' proposed finding of fact number IX for the reason that the same is contrary to the evidence; is unsupported by any

competent evidence and against the clear weight of the evidence and is contrary to the established law and customs of Alaska.

CONCLUSIONS OF LAW

"1.

"The defendant Emma Grace Lowe objects to the plaintiffs' proposed conclusion of law set forth under paragraph No. 1 for the reason that she contends it to be contrary to the laws of Alaska, and of the United States affecting the question involved herein, and said conclusion is based upon the Court's contention throughout this entire proceedings that the act of Congress of May 31, 1938, which is Chapter 297 of United States Statutes at Large, Vol. 52, and found on page 588, did repeal Section 384 of Title 48 U. S. C. A.; which was passed in 1907, and generally referred to as the 'Waskey Act.' In this connection the defendant requests a finding of facts that the above referred to 'Waskey Act' is still in full force and effect in Alaska and a finding for the defendant on the questions covered by Paragraph I. [170]

1a.

"The defendant further objects to the conclusion of law wherein the 'L Association' claim is described, because there is no competent evidence to base such a conclusion on, and on evidence of the description as outlined in said requested conclusion of law.

2.

"Defendant objects to the plaintiffs' proposed conclusion of law set out under Paragraph 2, for

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all of the reasons set forth as objections to conclusion number 1, and in addition thereto, further objects thereto, since there is no evidence to support such a conclusion of law, there is no competent evidence describing the 'Snow Shoe Fraction,' as it is described in this conclusion of law. That said proposed conclusion is in conflict with the laws of the United States and the Territory of Alaska, and not based upon any facts proven in the case.

3.

"Defendant objects to plaintiffs' proposed conclusion of law No. 3, for the reason it is contrary to the laws of the United States and the laws of the Territory of Alaska, and is contrary to the evidence and not justified under the state of the record.

4.

"Defendant objects to plaintiffs' proposed conclusion of law set forth in Paragraph IV, for all of the reasons above set forth and for the further reason that it is contrary to the laws of the United States and the Territory of Alaska, and not based upon any competent proof in this case.

5.

"Defendant objects to plaintiffs' proposed conclusion of law set forth in Paragraph 5, for all of the reasons set forth above, which are hereby adopted as fully as if set out herein again."

That the Court thereupon denied such objections and executed the Findings of Fact and Conclusions of Law and Decree as submitted by plaintiffs'

counsel and caused the same to be entered in that form in the records of this Court, to which action the defendant duly excepted.

Exception No. 8

During the trial of said causes, the plaintiffs on rebuttal, in order to show the resumption of work on said mining claims offered in evidence plaintiffs' identifications Nos. 26, 27 and 28, which were received in evidence over defendant's objection [171] and marked as plaintiffs' Exhibits X, Y and Z, said exhibits being affidavits of labor, and Exhibit X, being in words and figures as follows:

PLAINTIFFS' EXHIBIT X

(No. 26 for Identification)

AFFIDAVIT OF ANNUAL LABOR
FOR YEAR 1938-1939

United States of America,
Territory of Alaska—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described;

That Affiant is the attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and

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on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year beginning at noon the first day of July, 1938, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars ($100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds $100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: * * * * [173]

["Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including on page 176 the following:]

Fairbanks-Fish Creek	Character of Work	Value
Snowshoe Fraction	12½ man days brush cutting	100
L Association	12½ man days brush cutting	100"

(b) The number of days work done on each of said claims is the equivalent of 12½ days of 8 hours each of one man's labor for each $100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor

and making the improvements was between noon of the first day of July, 1938, and noon of the first day of July, 1939.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine Corporation.

(e) The actual amount paid for such work or improvement was more than Thirty Two Thousand Four Hundred Thirty Seven Dollars ($32,437.00) and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent of at least 12½ days work of 8 hours each of one man for each $100 thereof.

JAMES D. CRAWFORD.

Subscribed and sworn to before me this 25th day of September, 1939.

(Seal) HERTHA N. BAKER,
Notary Public in and for the Territory of Alaska.

My Commission expires Feb. 28, 1941.

Approved as to form S. R. P. [179]

And Exhibit Y being in words and figures as follows:

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PLAINTIFFS' EXHIBIT Y
(No. 27 for Identification)

AFFIDAVIT OF ANNUAL LABOR FOR YEAR 1939-1940

United States of America,
Territory of Alaska.—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described;

That Affiant is the attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year beginning at noon the first day of July, 1939, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars ($100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds $100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: [181]

["Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including among others:]

Fish Creek	Character of Work	Value
Snowshoe Fraction	Stripping moss	100

(page 186 transcript)

(Note: The L Association claim is not included in this proof of labor.)"

* * * *

(b) The number of days work done on each of said claims is the equivalent of 12½ days of 8 hours each of one man's labor for each $100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor and making the improvements was between noon of the first day of July, 1939, and noon of the first day of July, 1940.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine corporation. [188]

(e) The actual amount paid for such work or improvement was more than Forty Seven Thousand One Hundred Twenty Seven Dollars ($47,127.00) and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent

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of at least 12½ days work of 8 hours each of one man for each $100 thereof.

JAMES D. CRAWFORD.

Subscribed and sworn to before me this 23rd day of September, 1940.

(Seal) HERTHA N. BAKER,

Notary Public in and for the Territory of Alaska.

My commission expires Feb. 28, 1941. [189]

And Exhibit Z being in words and figures as follows:

PLAINTIFFS' EXHIBIT Z
(No. 28 for Identification)

AFFIDAVIT OF ANNUAL LABOR FOR YEAR 1940-1941

United States of America,
Territory of Alaska.—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described;

That Affiant is the Attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year begin-

ning at noon the first day of July, 1940, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars ($100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds $100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: [191]

["Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including among others:]

Fish Creek	Character of Work	Value
Snow Shoe Fraction	55 foot prospect drill hole	$165
L Association	48 foot prospect drill hole	144"

* * * *

(b) The number of days work done on each of said claims is the equivalent of 12½ days of 8 hours each of one man's labor for each $100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor and making the improvements was between noon of the first day of July 1940 and noon of the first day of July, 1941.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine corporation.

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(e) The actual amount paid for such work or improvement was more than Fifty Three Thousand Four Hundred Thirty Nine ($53,439.00) Dollars and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent of at least 12½ days work of 8 hours each of one man for each $100 thereof.

JAMES D. CRAWFORD.

Approved as to form.

Subscribed and sworn to before me this 25th day of August, 1941.

(Seal) HERTHA N. BAKER,
Notary Public in and for the Territory of Alaska.

My commission expires Feb. 28, 1945. [197]

Mr. James E. Crawford, dredge superintendent for the plaintiff U. S. Smelting, Refining and Mining Company was called as a witness on behalf of the plaintiffs, to identify such exhibits, and the proceedings regarding the identification, offering and reception of said exhibits in evidence are as follows:

"Testimony of JAMES E. CRAWFORD

Direct Examination on Rebuttal

"Questions by Mr. Pfund:

Q. Mr. Crawford, you have already been sworn?
A. Yes.

Q. And I will show you Plaintiffs' Identifica-

(Testimony of James E. Crawford.)

tion "26" and direct your attention to page 7, and ask if that is your signature? A. Yes.

Q. Did you prepare this instrument? A. Yes.

Q. After it was prepared, what did you cause to be done with it? A. It was prepared and executed and recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Mr. Pfund: If your Honor please, we offer Plaintiffs' identification "26" in evidence.

Mr. Bell: I object to it for the reason it hasn't been identified properly; no showing that it has anything to do with this law suit, and the instrument shows on its face that if it purports to be an affidavit of annual labor, it does not comply with the Statutes and laws of the Territory of Alaska in full force and effect during the years 1938 and '39, that it purports to cover. The instrument does not comply with that law in any way. It doesn't provide who did the work, it doesn't provide what kind of work was done, it does not provide at whose instance and request it was done, it does not show the necessity for doing the work, or the kind of work that was done, and it does not show on its face that the property involved herein was benefited in any way by it; and for the further reason there is no pleading of resumption of labor in this case. They cannot plead in this case anything they did not plead in the adverse claim, and they did not plead anything of that kind in the adverse claim filed affecting this particular property before the United States Land Office at Fairbanks.

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(Testimony of James E. Crawford.)

Mr. Pfund: If your Honor please, this is rebuttal testimony. The defendant put on a witness who testified he saw no work done, and that he was out on the claim in question in March, 1939. He testified he saw no work done. This affidavit is for the purpose of simply rebutting that testimony. The Statute provides that when the affidavit is recorded, that it shall be prima facie evidence. That affidavit shows on the back of it it was recorded in the Fairbanks Recording District, and that is identified by the witness. Most of counsel's objections are artificial, because he didn't bother to read the affidavit to see what it claimed. [198]

Mr. Bell: I was following it when you dictated it. I object on the further reason there is already a forfeiture of the land before 1938 and 1939, and work done there on it at that time would not be effective to protect the land in the name of the plaintiff, herein; and for the further reason there is no title, properly proven, of the land or the mining claims. And for the further reason, your Honor, I call your attention, that there is an affidavit filed in this case of a different thing altogether—an affidavit by Sutherland as to the labor done for that year. Is that right? Is that what you said?

Mr. Pfund: I didn't understand you, Mr. Bell.

Mr. Bell: I understood you to say we showed an affidavit filed by Sutherland on that date. Is that what you said?

Mr. Pfund: I said that your witness, Radovich,

(Testimony of James E. Crawford.)
testified he was on the claim in 1939 and saw none of the people out there, as I recall his testimony.

Mr. Bell: He testified further, didn't he, that he didn't do any work for the United States Smelting and Refining Company, and the affidavit that was introduced in evidence showing that he did, that he and Dan Sutherland sunk this hole at the request of the United States Smelting and Refining Company was not true; he didn't do it. That is what he testified to. Now, then, they relied upon that. Now they find out that has been disproved, and go out and try to dig up another one, and they don't plead that anywhere in the adverse claim filed in the United States Land Office. Therefore, it is going beyond the adverse claim here.

Mr. Pfund: Not necessary for us to plead.

The Court: Objection overruled. It may be admitted.

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "X".

(Whereupon, Mr. Pfund read Plaintiffs' Exhibit "X" to the Court and jury.)

Mr. Bell: What date did you say it was recorded?

Mr. Pfund: September 28.

Mr. Bell: In '39 or '38?

Mr. Pfund: '39.

Mr. Bell: Comes now the Defendant and moves to strike the instrument since it has been read it shows to the Court that it does not meet the re-

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(Testimony of James E. Crawford.)

quirements of Section 260 of the Compiled Laws of Alaska, which is—which does provide how an affidavit for annual labor can be filed, what it must contain, and how it should be, describe it, and this doesn't do that. Therefore, it doesn't meet the requirements of Section 260 of the Compiled Laws of Alaska.

The Court: Motion denied. [199]

Mr. Bell: Exception.

Q. Mr. Crawford, I will show you Plaintiffs' Identification "27", and direct your attention to page 9, and ask you if that is your signature? A. Yes.

Q. Who prepared this document? A. I did.

Q. And after you prepared it, what did you do with it? A. I had it recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Q. And you swore to it before a Notary? A. Yes, I actually swore to it.

Mr. Pfund: If your Honor please, we offer Plaintiffs' Identification "27" in evidence.

Mr. Bell: I object to it for the reason it is incompetent, irrelevant and immaterial; not tending to prove or disprove any of the issues in the case; it is not within the adverse claim filed in the United States Land Office at Fairbanks, Alaska, in Number MS 2105—or MA 05946; and for the further reason that it is incompetent and is not done in compliance with Section 260 of the Compiled Laws of Alaska. It does not meet the requirements in the Statute that requires, makes

(Testimony of James E. Crawford.)

the requirement of what the affidavit shall state. For the further reason the affidavit is ambiguous, uncertain, indefinite, it covers multitudes of property belonging to the plaintiff, and does not give the amount of work done or the name of the man doing the work. It does not show whether this particular man was paid for the work, it doesn't show what he did on these particular properties, and is therefore incompetent too, for any purpose under the laws, and we object to it on the further ground that it is—there is no proper foundation laid for it, because there is not a showing made up to this time that the ground had not been previously forfeited from 1908 up to this time, and the statement of 'stripping moss', of itself, does not show any benefit to this claim, and shows now, by the evidence here, that it would be positively no benefit, if they did do it, and that is all they contend in that affidavit.

The Court: May I see the instrument?

Mr. Pfund: I make the same statement, if your Honor pleases, with respect to this Plaintiffs' Identification "27" that I made with respect to the prior one.

The Court: Very well. You are offering this only for the 'Snow Shoe Fraction'?

Mr. Pfund: That is all, your Honor.

The Court: Objection overruled. It may be admitted.

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "Y".

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(Testimony of James E. Crawford.)

(Whereupon, Mr. Pfund read Plaintiffs' Exhibit "Y" to the Court and jury.)

Q. Mr. Crawford, I show you Plaintiffs' Identification "28" and direct your attention to the last page, which [200] would be page 7, and ask you if that is your signature? A. Yes, it is.

Q. Who prepared this document? A. I did.

Q. After you prepared it, what did you do with it? A. I signed it in the presence of a Notary Public and had it recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Mr. Pfund: We offer Plaintiffs' Identification "28" in evidence, if your Honor please.

Mr. Bell: We object to it for the reason it is not properly identified; for the further reason it is not pleaded in the adverse claim in the United States Land Office; that it is not executed as by the laws of the Territory of Alaska required at the time, for the years of 1940 and '41; and for the further reason that it does not show any competent labor done on either of these claims, and it does not show—no—and for the further reason there is no proof and no proper foundation laid that the claims were not forfeited from 1908, at the time of the staking of the claims, up to the time of the filing of this; therefore, I think it is the duty to show it was in full force and effect at that time, or it would be forfeited by the terms of the Waskey Act, which was passed in 1907, and prior to the location of these claims.

Mr. Pfund: I make the same statement with

(Testimony of James E. Crawford.)

respect to this as I made with respect to the first of these affidavits, your Honor, which I believe was Plaintiffs' Exhibit "X".

The Court: Very well.

Mr. Pfund: I also call the Court's attention to this fact, that if there is any contention here with respect to resumption of labor, that there affidavits, of course, do show a resumption of labor and labor performed.

Mr. Bell: Your Honor, in response to that statement, before you rule—

The Court: I disagree with Mr. Pfund, but that is a legal question we needn't go into now.

Mr. Bell: That is right. Your Honor, I want to state one more objection and that is this, that if you should hold that resumption of labor does apply, now, and hold that the Waskey Act does not apply, then the laws of the Territory of Alaska at the time of the resumption of labor—that they are attempting to prove—prohibited the location of a claim the size of the "L Association". Therefore, the resumption of labor could not go back and do something that had been forfeited over the many years from the passage—from the location, up to the time that your Honor contends the Waskey Act was repealed, and then do something that the individuals could not do, themselves. That is, locate 160 acre claims at that time; at the time this resumption of labor is attempted to prove; and for the further reason there is no pleading of a resumption of labor anywhere in the pleadings in

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(Testimony of James E. Crawford.)
this case, and I have repeatedly objected on that ground.

The Court: The objection to this Identification is overruled. It may be admitted. [201]

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "Z".

Mr. Pfund: I will ask Mr. Clasby to read that file, may your Honor, please.

(Whereupon, Mr. Clasby read Plaintiffs' Exhibit "Z" to the Court and jury.)

Mr. Bell: Comes now the defendant and moves to strike this instrument. Since the reading thereof, it lacks the one requirement in the affidavit of acknowledgement of the person making the affidavit, that the labor and improvements was actually done on the "Snow Shoe Fraction", or the "L Association".

The Court: Motion denied.

Mr. Bell: Exception.

Mr. Pfund: That is all for Mr. Crawford."

(Tr. of Testimony 416 to 424.)

EXCEPTION No. 9

That the testimony submitted as regards the boundaries of the Snow Shoe Fraction claim was that as located and staked upon the ground in 1908, it was a fraction of ten acres, more or less, in rectangular form 350 feet wide by 1500 feet long, off the L Association claim on the left limit, and marked with four stakes, one at each of the four

corners. That as so located and staked the said Snow Shoe Fraction claim overlapped in large part certain prior locations known as the Miller Bench and Luloo, and perhaps others, all of which had been located prior to the said Snow Shoe Fraction and were valid, subsisting and outstanding locations upon the said area so in conflict at the time of such location of the Snow Shoe Fraction. That such prior locations subsequently went forward to patent as part of mineral surveys Nos. 1690 and 1696. That no subsequent amendment or re-staking of the Snow Shoe Fraction claim was claimed or shown but that the remainder of the ground, originally covered by said claim, after excluding said area in conflict, is as shown on the plat of mineral survey No. 2153, plaintiffs' Exhibit K, which is made a part of this Bill of Exceptions by reference, the original will by stipulation, be in the Appellate Court and described in paragraph 3 of the Findings of Fact and Conclusions of Law, as entered herein, and contains approximately [202] 2½ acres. That as recited in Exception No. 7, plaintiffs' counsel, pursuant to direction of the Court submitted forms of Findings of Fact and Conclusions of Law and Decree, to which defendant in due form and time submitted, among others, the following objections:

(Findings of Fact)

"Defendant objects to plaintiffs' proposed findings of fact Number III for the reason that the same is not sustained by the evidence; is contrary

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to the evidence; is against the clear weight of the evidence, and is not a matter covered by the pleadings, and is incompetent, irrelevant and immaterial and not within the issues as to each and every part thereof. * * *

(Conclusion of Law)

"Defendant objects to the plaintiffs' proposed conclusion of law set out under Paragraph 2, for all of the reasons set forth as objections to conclusion Number 1, and in addition thereto, further objects thereto, since there is no evidence to support such a conclusion of law, there is no competent evidence describing the 'Snow Shoe Fraction', as it is described in this conclusion of law. That said proposed conclusion is in conflict with the laws of the United States and the Territory of Alaska, and not based upon any facts proven in the case."

The Court nevertheless caused said Findings, Conclusions and Decree to be entered in the form as submitted.

* * * *

[203]

EXCEPTION No. 12

That no testimony or proof was offered upon the matter of attorneys' fees, at the trial of these cases, and no request was made by either party for the allowance of an attorneys' fee until the proposed form of findings and conclusions and decree were submitted by plaintiffs' counsel. Among the objections to the conclusions of law submitted by defendant appears the following:

"Defendant objects to plaintiffs' proposed conclusion of law set forth under Paragraph No. 6, and the whole thereof, and especially the part that refers to a reasonable attorney's fee, to be set by the Court for the reason that the plaintiff is not entitled to recover any attorney's fee from the defendant under the evidence and condition of the record."

The Court overruled such objection in executing the findings inserted of its own motion in Paragraph IX of the findings of fact and following matter:

"That the reasonable sum to be allowed the plaintiffs for attorneys' fees herein is the sum of $500."

And inserted such amount in the blank space appearing in Paragraph 4 of the decree at the close thereof, to all of which action the defendant duly excepted.

/s/ BAILEY E. BELL,
Attorney for Defendant. [212]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

I, Harry E. Pratt, Judge of the District Court of the United States for the Territory of Alaska, in and for the Fourth Judicial Division, and Judge of the above entitled Court, and the Judge before whom the above proceedings and all thereof were had and taken, as aforesaid, do hereby certify that

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following the proceedings mentioned and set forth in the foregoing Bill of Exceptions the final decree quieting title was rendered and entered in said cause in favor of the plaintiffs as will more fully appear from the record herein, and I, being now willing that a record may be had, certified and preserved of the said proceedings above set forth and of the exceptions taken and preserved by the defendant in the above entitled cause, do hereby certify and declare that all of the matters and things set forth in the foregoing Bill of Exceptions are in all respects correct and true; that the exhibits considered material to this Bill of Exceptions are either incorporated at length in the Bill of Exceptions itself or the original exhibit has been physically attached hereto and made a part hereof, and that this Bill of Exceptions has been duly presented and allowed within the time and in the manner prescribed by the laws of the United States, the Territory of Alaska and the rules of this Court; and do further certify and declare that the same is hereby approved, settled and allowed as and for a Bill of Exceptions herein, and is hereby made a part of the record in this case.

Dated, settled and allowed this 8th day of May, 1948.

/s/ HARRY E. PRATT,
District Judge.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 27, 1948.

[Endorsed]: Filed May 8, 1948. [213]

[Title of District Court and Causes Nos. 5493-94.]

CITATION

The President of the United States of America, to Walter Jensen, The United States Smelting Refining and Mining Company, a Maine Corporation, and the First National Bank of Fairbanks, Alaska, Administrator of the Estate of Gustaf Soderblom, Defendants, and Collins & Clasby and Southall R. Pfund, Attorneys for the Plaintiffs, who are Defendants in Error in this Appeal, Greetings:

You, and each of you are Hereby Cited to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above-entitled action on the 8th day of April, 1948, in favor of the Plaintiffs in each of the cases as consolidated, and against the Defendant, Emma Grace Lowe, should not be corrected, set aside, and reversed.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and the Honorable Harry E. Pratt, District Judge of this Court. [214]

Attest my hand and the seal of the above-named District Court for the Territory of Alaska, Fourth Judicial District, on this 8th day of May, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal May 10, 1948. No. 36, page 268. [215]

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MARSHAL'S RETURN ON CITATION

I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Judicial Division, do hereby certify and return that I received the hereto attached original Citation on the 13th day of May, 1948 at Fairbanks, Alaska; and that thereafter on the 13th day of May, 1948 at Fairbanks, Alaska I duly served the said writ on the First National Bank of Fairbanks by delivering a copy thereof to E. H. Stroecker, president, personally: and that thereafter on the 13th day of May, 1948 at Fairbanks, Alaska, I served the United States Smelting Refining and Mining Company, a Maine Corporation, by delivering a copy thereof to Roy B. Earling, General Manager, personally; and that thereafter on the 25th day of May, 1948 at Goldstream, 10 miles North of Fairbanks on the Steese Highway, I served Walter Jensen by delivering a copy thereof to Walter Jensen, personally.

Dated at Fairbanks, Alaska this 25th day of May, 1948.

STANLEY J. NICHOLS,
United States Marshal.

By /s/ CLINTON B. STEWART,
Deputy.

Marshal's Fees, $9.00; Marshal's Expense, $6.00; Total, $15.00.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1948. [216]

[Title of District Court and Cause Nos.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court:

You will please prepare a transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. The Complaint in Case No. 5493.
2. The Complaint in Case No. 5494.
3. The Demurrer to the Complaint in Case No. 5493.
4. Answer in Case No. 5493.
5. Answer in Case No. 5494.
6. Stipulation filed on June 28, 1946.
7. Order overruling the Demurrer to the complaint in case No. 5493.
8. Reply in Case No. 5493.
9. Reply in Case No. 5494.
10. Instructions of the Court.
11. Verdict of the Jury. [217]
12. Defendant's Requested Instructions.
13. Defendant's Objections to Instructions.
14. Motion to dismiss Plaintiff's Cause of Action and render judgment for Defendant, filed in both cases as consolidated.
15. Motion for judgment Non Obstante Verdicto, filed in both cases.
17. Findings of Fact and Conclusions of Law.

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18. Judgment and Decree, as rendered.
19. Notice of Appeal.
20. Petition for allowance of appeal.
21. Assignments of Error.
22. Order allowing appeal and fixing bond.
23. Bill of Exceptions.
24. Citation.
25. Praecipe for Record.
26. Appeal Bond.

This transcript to be prepared as required by the law and rules and orders of this Court, and of the Circuit Court of Appeals, for the Ninth Circuit Court, and the record is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals of the United States at San Francisco, California so that it will be docketed therein within the time allowed for filing the same there as shown by the order of the Court allowing appeal and fixing the bond.

Dated at Fairbanks, Alaska, on this 8th day of May, 1948.

/s/ BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1948. [218]

[Title of District Court and Causes Nos. 5493-94.]

APPEAL BOND

Know all men by these presents, that I, Emma Grace Lowe, as principal am held and firmly bound unto the United States of America in the sum of $250.00 to be paid to the United States of America; to which payment well and truly to be made I bind myself, my heirs, assigns, executors, and administrators, jointly and severally, by these presents.

Dated this 10th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in two suits pending in said Court, which were consolidated for all trial purposes, the title and number of each of said cases are set out above; in said consolidated cases the Plaintiffs were granted a judgment against this Defendant quieting title to properties involved therein and granting the Plaintiff judgment against the Defendant for all costs of these actions, denying this Defendant any recovery in said cases as consolidated. The Defendant has filed in this Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

The conditions of the above obligation is such that if the [219] said Emma Grace Lowe shall prosecute said Appeal to effect and pay all costs that may be taxed against her if for any reason the Appeal is dismissed, or if the judgment is affirmed,

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then, and in that event, this obligation to be void —otherwise to remain in full force and virtue.

Signed, sealed and acknowledged this 13th day of May, 1948.

Witnesses:

/s/ EMMA GRACE LOWE,
Principal.

/s/ EVERETT E. SMITH,

/s/ OLGA T. STEGER.

Subscribed and sworn to before me this 13th day of May, 1948.

(Seal) /s/ JOHN B. HALL,
Notary Public in and for the Territory of Alaska.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 13, 1948. [220]

[Title of District Court and Causes Nos. 5493-94.]

ORDER EXTENDING TIME TO FILE COUNTER PRAECIPE

Upon the application of plaintiffs in the above entitled action, and good cause appearing therefor, it is hereby ordered that plaintiffs may have to and including the 29th day of May, 1948, in which to prepare, serve and file their counter praecipe indicating additional portions of the record to be incorporated into the transcript on appeal.

Done in open court this 19th day of May, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal May 19, 1948, No. 36, page 280.

[Endorsed]: Filed May 19, 1948. [224]

[Title of District Court and Causes Nos. 5493-94.]

ORDER APPROVING APPEAL BOND

Whereas, upon the 13th day of May, 1948, the above-named Defendant filed herein an appeal bond for the appeal of said cases to the Circuit Court of Appeals for the Ninth Circuit, which said bond was duly executed by said defendant, but was not executed by any sureties; and

Whereas, said Defendant deposited with the Clerk of this Court upon the 13th day of May, 1948, the sum of Two Hundred Fifty ($250.00) Dollars cash, in lieu of procuring sureties upon said appeal bond; and

Whereas, the undersigned, Judge of said District Court, [230] upon the 13th day of May, 1948, did duly approve, as the appeal bond in this case, said cash deposit and said appeal bond;

Now, therefore, said appeal bond and said cash deposit of Two Hundred Fifty ($250.00) Dollars are hereby approved as defendant's said appeal bond.

This order shall be effective as of May 13, 1948.

Done at Fairbanks, Alaska, this 21st day of May, 1948.

HARRY E. PRATT,
District Judge.

Entered Court Journal May 21, 1948, No. 36, Page 281-282.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 21, 1948. [231]

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[Title of District Court and Causes Nos. 5493-94.]

COUNTER PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled court:

You will please include in the transcript of record in the above-entitled cause which you are preparing, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, the following additional papers and records, to wit:

1. Plaintiffs' motion for order extending time to file counter praecipe;

2. Notice of hearing on motion for order extending time to file counter praecipe;

3. Order extending time to file counter praecipe;

4. Objections to defendant's appeal bond:

5. Order overruling objections to defendant's appeal bond;

6. Order approving appeal bond;

7. Notice of plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing the defendant's bill of exceptions;

8. Plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions;

9. Affidavit of Southall R. Pfund in support of plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions;

10. Order denying plaintiffs' motion for an or-

der setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions.

11. This counter praecipe.

Dated: May 28, 1948.

/s/ SOUTHALL R. PFUND,
/s/ CHARLES J. CLASBY,
Attorneys for Plaintiffs.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 28, 1948. [243]

[Title of District Court and Causes Nos. 5493-94.]

Southall R. Pfund, of Fairbanks, Alaska, and Charles J. Clasby, of Fairbanks, Alaska, attorneys for plaintiffs. Bailey E. Bell, of Fairbanks, Alaska, attorney for defendant.

OPINION

This is a suit to quiet title in support of an adverse filed in the Land Office against Defendant Lowe's applications for patents.

The plaintiffs allege ownership of the "L Association" and "Snow Shoe Fraction", placer mining claims, by virtue of locations thereof in 1906. The defendant claims the ground in [244] controversy by locations made in 1941, upon the theory (a) that the location certificates of plaintiffs' predecessors were insufficient; and (b) that the annual labor was not done as required by law.

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The case was in the nature of a suit in equity, triable before the Judge, alone, but an advisory jury was empaneled. It found in favor of the plaintiffs, and against the defendant.

The legal phases of the case have been submitted to the Court upon briefs filed by counsel for the parties.

["Points I and II refer to matters not believed by the appellant to be involved in this appeal and are therefore omitted."] [245]

* * * *

III.

(a) As used hereinafter:

"C.L.A." shall mean Compiled Laws of Alaska, 1933;

"Annual Labor" shall be deemed to mean improvement for the benefit of a mining claim to the extent of $100, or mining work upon the claim in the same value, or mining work and improvements of the value of $100 in a designated annual labor year.

(b) Section 2324 R.S.U.S., as a part of said Section 26 of the Alaska Act, provided in effect:

(1) That failure to perform the annual labor upon a mining claim did not render it open to relocation unless the owner failed to resume work upon the claim after such failure and before relocation thereof;

(2) That the owner of a validly located mining claim was presumed to have done the annual labor and the burden of proving the contrary was upon any person asserting the same.

Lindley on Mines, 3rd Ed., page 1503, Note 29.

Morrison's Mining Rights, 16th Ed., page 130; 40 C.J. 845.

(c) In the Act of Congress, approved March 2, 1907 (hereinafter called the Waskey Act), entitled "An Act to Amend the Laws Governing Labor or Improvements Upon Mining Claims in Alaska", 34 Stat. 1243; T. 48, S. 384 U.S.C.A.; Sec. 162 Compiled Laws of Alaska 1913, (the Section being erroneously dropped from [247] the 1933 C.I.L.A.) appears in effect the following provisions:

(1) That if there was a failure to do the annual labor required by law upon a mining claim, a forfeiture ensued and the right of the owner to resume work after such failure was abolished.

(2) That if an affidavit of annual labor was not filed within 90 days after the close of the annual labor year, the burden of proof was upon the "claimant to establish the performance of such annual labor and improvements".

(d) The Waskey Act, therefore, repealed by implication (as it had no repealing clause in it) the conflicting parts of Section 2324, R.S.U.S., as a part of the laws of Alaska, and as mentioned above in sub-paragraphs C(1) and (2).

Thatcher vs. Brown (CCA 9th, 1911) 190 F. 708.

Ebner Gold Mining Co. vs. Alaska-Juneau Gold Mining Co. (CCA 9th, 1914) 210 F. 599.

(e) The defendant asserts that when an affidavit of annual labor is required by law, the Was-

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key Act provides, in effect, that failure to file an affidavit of annual labor is prima facie evidence that the annual labor was not done upon the claim.

For the purpose of treating the subject, it will be temporarily, only, assumed that such was the effect of the Waskey Act.

Section 2324, R.S.U.S., as a part of Section 26 of the Alaska law, and as amended by the Waskey Act, continued in that state until the amending Act of May 31, 1938, 52 Stat. 588; Title 48, U.S.C.A., Sec. 381, entitled "An Act to amend Section 26, Title 1, Chapter 1 of the Act entitled 'An Act making further [248] provision for a civil government for Alaska and for other purposes, approved June 6, 1900' ". This Act stated that said Section 26 was amended "to read as follows: 'Section 26. The laws of the United States relating to mining claims, mineral locations and the rights incident thereto are hereby extended to the Territory of Alaska; * * * *' ". Then follows some changes as to mining on and below tide water lands.

The 1938 amendment does not refer to the Waskey Act in any respect, nor does it include any of the provisions of the Waskey Act.

(f) The plaintiffs assert that if the Waskey Act repealed by implication the right given by Section 2324, R.S.U.S., to resume work after failure to do annual labor and for the owner of a claim to have the presumption that annual labor was done, the Act of 1938 making the laws of the United States, to-wit, Section 2324, R.S.U.S., a part of the laws of Alaska without mentioning or

including the provisions of the Waskey Act, repealed that Act by implication. The defendant maintains that the following rule of interpretation governs and that the Waskey Act remains in full force and effect. Said rule is as follows, as set forth in 50 Amer. Juris., page 558, Section 563:

"A later law which is merely a reenactment of a former law does not repeal an intermediate act which has qualified or limited the first one, but the intermediate act will be deemed to remain in force and to qualify or modify the new act in the same manner as it did the first. * * * * These rules are, however, mere canons of construction, or aids to the ascertainment of the legislative [249] intent, and must yield to such intent."

The rule just set forth in the first sentence will hereinafter be called "the intermediate amendment rule".

Of course, said rule was announced by courts in the light of the facts of the case before them and of the constitution and laws governing.

An examination of the cases which establish the rule will show the following:

(a) That there was a constitutional provision requiring that no law should be amended by reference to the title, only, but that the law should be re-enacted and inserted at length in the new act. Sec. 230, Lewis' Sutherland Statutory Construction (2nd Ed.).

(b) The new law should embrace no more than one subject, which should be expressed in the title. Sec. 100, id.

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The part these constitutional provisions played in making said intermediate amendment rule is reflected in the cases on the subject. As Congress never had such limitations upon it, the rule cannot be of assistance in interpreting the intention of Congress as to an Act.

In: State vs. Clauson (Wash.) 190 P. 752-754, the Court said: "In construing the amendment of 1919 it is manifest that the use or repetition therein of language found in the original act, including that relating to the basis of the valuation of property of the district upon which the five percent. limit of indebtedness should be computed, which in no way interfered with the revisions and extensions the Legislature desired and intended [250] to accomplish by the amendment, was but a vehicle or means mandatorily required by the Constitution."

Quoted cases in this decision show that such was the situation also in the states of Michigan, New Jersey and Oregon.

Illinois also had a similar constitutional restriction. People vs. Lloyd, 136 N.E. 505.

In Eddy vs. Kincaid (Or.) 41 P. 156, rehearing page 655, which is cited as announcing said intermediate amendment rule, we find that although the Court, in the first hearing, stated the second amendment was not new matter and therefore did not amend the intermediate act, the basis of the opinion on rehearing was that the intention of the Legislature was not to repeal the intermediate act, this intention being shown by the title of the third act, and by the enumeration of the offices that were to be

filled at the election (said enumeration not including railroad commissioners).

In: Allison vs. Hatton (Or.) 80 P. 101, also cited as establishing the intermediate amendment rule, we again find the case being decided upon the intention of the Legislature, ascertained from the title of the act, and the fact that no provision was in it for making abstracts of title, from the records of the county which was allegedly losing the land, and filing them in the recorder's office of the county, which was allegedly receiving the strip of land.

While a few of the Oregon cases adhered to the intermediate amendment rule, the Supreme Court of Oregon definitely refused to follow the rule in the case of State ex rel. Brady vs. Lightner (Or. 1915) 152 P. 232.

Chapter 127, General Laws of Oregon, 1915, in [251] Sec. 1 thereof, amended Section 6313, L.O.L., as amended in 1913. The amendment consisted in adding a proviso that each incorporated city or town should constitute a separate road district.

Chapter 194, General Laws of Oregon, 1915, again amended Section 6313, as amended by the laws of 1915. This amendment consisted in leaving off the proviso which was put on by Chapter 127 aforesaid, and by changing the October term to the September term. With the exception of changing October to September, it was a copy of the law as it existed prior to said Chapter 127.

Thus the situation was entirely covered by the intermediate amendment rule.

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The Court held: "Chapter 127, the first act, purporting to amend Section 6313, is superseded by the second act as far as there is any difference, because the Constitution requires that the act revised or section amended shall be set forth at length in the amendatory act. If there is anything to be added to section 6313 as set forth in the last amendatory act, the Constitution is thereby violated. * * * * * Amendment of an act or section by setting it out in full 'so as to read as follows' operates as an entire obliteration of the former act after the new one goes into effect." Citing, among other cases, "Columbia Wire Co. vs. Boyce, 104 F. 172; Heinze vs. Butte, 107 F. 165 (C.C.A. 9th)." It further stated: "It is settled by the great weight of [252] authority that the act amended, being the last expression of the Legislature, is the law. * *"

This case involves the same situation which confronts us in the present case, and it, in effect, overrules all prior Oregon cases to the contrary.

In: In re Ferguson's Estate (Pa.) 189 A. 289, at page 292 the Court said:

"If such radical departure from the legislative policy had been intended by the Fiscal Code, it would have been clearly indicated in the title as required by Article 3, Sec. 3 of the Constitution".

Illinois: Smith-Hurd Rev. Stat. 1931, Chap. 131, Sec. 2, provided that any provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment. City of Altamont vs. Baltimore and Ohio R. Co. (Ill.

1932) 180 N.E. 809. Thus the statute of Illinois compels its courts to interpret a statute in the same manner as the interpretation declared by the intermediate amendment rule.

IV.

The rule is subject to the exception that where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed.

In Gaston vs. Merriam (Minn.) 22 N.W. 614, the intermediate amendment rule is set forth, and the court then says:

"If, then, Section 37, C. 6, Laws 1877, operated to modify * * * the same provisions of the law of 1874. regarding the time of redemption, it must be [253] deemed as continuing in force to modify or qualify the same provisions re-enacted in the Law of 1878 unless, (1) the act of 1878 covers the entire subject covered by Section 37, and was plainly intended as a substitute for it, and to furnish the only rules on the subject; or (2) that the provisions of the two acts are so irreconcilably inconsistent that they cannot stand together."

To the same effect are:

Board of Education vs. Tyler County Court (W. Va.) 67 S.E. 870;

Buchsbaum & Co. vs. Gordon (Ill.) 59 N.E. (2) 832;

State ex rel. Brady vs. Lightner (Or.) 152 P. 232.

In Hawes vs. Pliegler (Minn.) 92 N.W. 223,

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with reference to plaintiff's insistence that the rule of construction (intermediate amendment rule) governed the case, the Court said, p. 224:

"Both Acts, however, remain as they are on the statute books, but the former in time of enactment repeals the later, under the plaintiff's application of the strict, technical rules of interpretation. Meanwhile the citizen is inexorably held to the letter of the intermediate act, * * * *. But canons of construction are not arbitrary or infallible, and should not be permitted to prevail against reason and justice in construing inharmonious legislative enactments. * * * * 'Canons of construction are not the masters of the courts, but merely [254] their servants.'"

The court held that the third act repealed the intermediate amendment, though it re-enacted the first act without mentioning the intermediate one.

In: In re Metcalf's Estate (Pa.) 179 A. 587, the court said that the appellant, in relying on the rule (intermediate amendment rule):

"ignores the exception to the rule that, 'where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed.'"

The holding of the Pennsylvania courts that a subsequent amendment which was inconsistent with an intermediate amendment would repeal the intermediate amendment to the extent of the inconsistency, was approved by the Pennsylvania Legislature by the Act of May 18, 1937, Article V, Sec-

tion 75, 46 P.S., Section 575, providing "whenever two or more amendments are made, if they are irreconcilable, the later in date shall prevail."

In: State vs. Klasen (Minn.) 143 N.W. 985, the court stated, with reference to the intermediate amendment rule:

"It may be conceded that chapter 43 is an intermediate act within the rule, * * * * The principle stated, however, is a mere canon of construction, or aid to the ascertainment of legislative intent, and must yield to the latter. * * * * Laws are presumed to have been passed with deliberation, and with full knowledge of all existing ones on the same subject. * * * * we reach the conclusion that the provisions [255] of the two acts are so irreconcilably inconsistent that they cannot stand together, * * * *". The last amendment was held to be controlling. To the same effect is the case of Klarne vs. Drainage Dis. (Ill.) 43 N.E. (2) 986-968.

V.

Construction of Acts of Congress never were aided by the intermediate amendment rule.

When it passed the 1938 Act, Congress is presumed to have known the law upon the subject, to-wit, Sec. 2324, R.S.U.S., as a part of Sec. 26 of the Alaska law, as amended by the Waskey Act.

50 Amer. Juris. 331;
Sullivan vs. Ward (Mass.) 24 N.E.(2) 672:
State vs. Klasen (Minn.) 143 N.W. 985.

In: Continental Ins. Co. vs. Simpson (CCA 4th) 8 P.(2) 439, at page 442 the court says:

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"The legislature is presumed to legislate with knowledge of former related statutes * *".

"In: "The Penza" (CCA 2nd) 9 P.(2) 527-528, it was held:

"It is always assumed that statutes are passed in light of, and with reference to preexisting law * * * *".

If, in 1938, Congress had intended to amend only the portion of said Section 26 of the Alaska law which referred to mining on beaches, it could have expressed that intention very simply, not being required by the constitution or statutes to [256] repeat the wording of the statute on the other subject.

Congress having, in plain unambiguous words stated in the 1938 Act that the laws of the United States relative to mining claims and rights incident thereto, should be in force in Alaska, there is no room for construction.

United States vs. Missouri Pac. Railroad Co., 278 U.S. 269-277, where the court said:

"It is elementary that where no ambiguity exists there is no room for construction. * * * * Construction may not be substituted for legislation."

The same rule is in Commissioner of Immigration vs. Gottlieb, 265 U.S. 310.

Having, in 1900, by Section 26 of the Alaska Act, placed the laws of the United States in operation in Alaska as to mining claims and rights incident thereto, and having found that wording successful in carrying out its intent, there was no reason for Congress to change that wording in 1938 when it

intended to do the same thing. There is no reason why Congress should abandon any phrases merely because they have been used before, there being no law governing Congress which makes it necessary or expedient so to do.

In: Wilbur vs. U.S. (C.A.D.C.) 30 F.(2) 871, the court says, at page 872:

"Rules of statutory construction are never used to create, but only to remove, a doubt."

In: Crooks vs. Harrelson, 282 U.S. 55, the court said, at page 59:

"It is urged, however, that if the literal [257] meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in Holy Trinity Church vs. United States, 143 U.S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense, * * * And there must be something to make plain the intent of Congress that the letter of the Statute is not to prevail. Treat vs. White, 181 U.S. 264, 268."

In Northern Pac. Railway vs. Concannon, 239 U.S. 362, at page 385 the court says:

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"* * * * this interpretation of the act is inconsistent with its text * * * *. We say it is inconsistent with its text because in express terms the validating power * * * was made applicable only to 'all conveyances heretofore made', and nothing in the context [258] lends itself to the conclusion that Congress contemplated conferring on the Railway Company unlimited power * * * *."

"The court cannot attribute to the Legislature an intent which is not in any way expressed in the statute." 59 C.J. 958.

Resort cannot be had to the legislative history of an act unless the statute is ambiguous. 50 Amer. Juris. 321, Sec. 328.

"It is urged that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, 'if the language be clear, it is conclusive'." Osaka Shosen Kaisha Line vs. U. S., 300 U.S. 98, 101.

The fact that the Act of 1938 purports only to amend Section 26 of the Alaska Act of 1900 and does not mention the amendment thereof, is immaterial as the reference to the original act means that act, as amended, up to the date of the reference.

State ex rel. Brady vs. Lightner (Or.) 152 P. 232, 233;

Whitfield vs. Davies (Wash.) 138 P. 583-1;

Duke vs. Amer. Casualty Ins. Co. (Wash.) 226 P. 501;

Fletcher vs. Prather (Calif.) 36 P. 658;

West & Co. vs. Board of Com. (Idaho) 34 P. 445; [259]

Yakima Amusement Co. vs. Yakima County (Wash.) 73 P. (2) 519;

State ex rel. City of Omaha vs. Board of Com. (Neb.) 189 N.W. 639;

50 C.J. 881, Sec. 464; also page 883, Sec. 472.

VI.

The intermediate amendment rule has never been the rule or construction of Acts of Congress or state laws where not required by a Constitution or Statute.

In Heinze vs. Butte & B. Counsel. Min. Co. (9th Cir.) 107 F. 165, it was held as set forth in the syllabus:

"The act of June 6, 1900, providing that section 7 of the act of 1891, relating to the jurisdiction of the circuit court of appeals as to injunction cases, should be amended to read as therein prescribed, is valid, notwithstanding it purports to amend a section of the act which had already been amended by the act of February 18, 1895, to which it did not refer, and its enactment necessarily operates to repeal the latter amendment."

To the same effect are:

Columbia Wire Co. vs. Boyce, (7th Cir.) 104 F. 172;

Whitfield vs. Davies (Wash.) 138 P. 863;

Rouw Co. vs. Crivella (8th Cir.) 105 P. (2) 434-436; [260]

Koprivica vs. Sather, 10 Alaska 593.

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In: In re Lont, 34 Fed. Supp. 700, the court stated, page 705:

"This is legislative reaffirmation of what was originally said in 1918, in the face of Act 145 of 1934. The implied amendment of the act of 1918 by Act 145 of 1934 is, therefore, nullified."

In Continental Ins. Co. vs. Simpson (CCA 4th) 8 F. (2) 439, at page 441 the court says:

"But in both the Legislature first amended the original statute and then at a different time again amended and re-enacted it, omitting the first amendment. The rule is well established, and the reason for it plain, that the first amendment of a statute is repealed when the statute referred to is again amended and wholly re-enacted with the omission of the first amendment."

In Vansant Kitchen & Co. vs. Commonwealth (Va.) 60 S.E. 753, the Court said:

"We think it plain that the second amendment operated as a repeal of the first amendment * * * *. 'The repeal of a statute by implication is not favored by the courts * * * *. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable * * * *. But where the latter statute was plainly intended to embrace [261] the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed.' "

In Western Assur. Co. vs. Stone (Va.) 134 S.E. 710, the court approves the "reasons and authorities" of the court in the case of Vansant Kitchen & Co. vs. Commonwealth, supra.

In 1900, when the laws of the United States relative to mining claims and rights incident thereto were adopted for Alaska by Section 26 of the Alaska Act, such adopted laws were complete legislation upon that subject. Therefore, when the Act of 1938 again put the laws of the United States forward as the laws governing Alaska with reference to mining claims and rights incident thereto, that act embraced the whole legislation upon the subject and was to be wholly substituted for any formed statutes.

VII.

From the foregoing, it appears that the Act of 1938 repealed the Waskey Act insofar as it provided:

(a) For the abolishment of the right to resume labor upon a mining claim after failure to do the annual labor thereon;

(b) That failure to file the annual labor affidavit should throw the burden on the claimant [262] to prove the doing of the annual labor.

VIII.

The Waskey Act did not make the failure to file an affidavit of annual labor prima facie evidence that the annual labor was not done.

The wording of the Waskey Act upon the above subject is:

"Such affidavit shall be prima facie evidence of

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the performance of such work or making of such improvements, but if such affidavit be not filed within the time fixed by this Act, the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements and upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to the performance and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made."

Inasmuch as the law makers had just used the words "prima facie evidence" as to the effect of filing an affidavit of annual labor, it would have been natural for them to have used the same words if they intended to state the converse, to-wit, that the failure to file such an affidavit should be prima facie evidence that the annual labor was not done.

Attention is called to the use of the word "Claimant", [263] in describing one upon whom the burden of proof was to be placed if there was a failure to file an affidavit of annual labor. That is a word which is seldom used with reference to a party to a suit in court. An examination of the Land Office rules with reference to the procedure for getting patents to mining claims shows that in the first 108 regulations the word "claimant" is used 32 times to describe the applicant for a patent.

As the statutory rule of construction is that words are to be given their common meaning unless the statute shows they were used with some

other meaning, the word "claimant" in the Waskey Act should be presumed to refer to the applicant for patent in the Land Office.

The fact that a later Act of Congress amending the mining laws also has one section which relates entirely to Land Office matters, to-wit, patenting a mining claim, lends some weight to the above-mentioned interpretation.

The Act of Congress approved August 1, 1912 (37 Stat. 243; 48 U.S.C.A., Sec. 390; Sec. 351, C.L.A.), and being entitled: "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes", in the next to the last section thereof, provides:

"Sec. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width."

But even if the word "claimant" be interpreted to mean a party in court affirmatively claiming that the annual labor was done upon his claim, the Waskey Act would not place the burden of proof upon the plaintiffs in this case, because they never got to the point where they were claimants. As the plaintiffs showed valid locations of their mining claims, the law raised the presumption that they did the annual labor upon the claims. This [264] presumption continued until the defendant made a prima facie showing that the annual labor was not done. Until such showing was made, and it never was made in this case, the plaintiffs were not required to say anything about annual labor

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and therefore were never to be classified as "claimants".

The above interpretations are in keeping with the attitude of the courts toward forfeitures.

It was stated in 2 Lindley on Mines (3rd Ed.), Sec. 645:

"We have heretofore observed the reluctance with which the courts enforce this penalty. They have settled the doctrine that the forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law. * * * * The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious."

Also Morrison's Mining Rights (16th Ed.), 632.

IX.

Effect of repeal of Waskey Act on burden of proof.

Even if the Waskey Act made prima facie evidence out of the fact that an affidavit of annual labor was not recorded, its repeal by the Act of 1938 freed cases, arising before but commenced after the repeal, of such prima facie provision. 59 C.J. 1173.

"Remedial statutes, such as this, which affect only the procedure and practice of the courts in the enforcement of a right, and which do not impair the right itself, or wholly destroy a pre-existing remedy, are retroactive in the sense that they must be applied to causes of action existing at the

time of their passage in all cases where the suit is subsequently commenced." (Southern Indiana Ry. Co. vs. Peyton (Ind. '01), 61 N.E. 722, 723).

This rule has been applied in cases involving the shifting of the burden of proving or disproving contributory negligence.

Smith vs. Freeman (Mass. '29) 167 N.E. 335;

Sackheim vs. Pigueron (N. Y. '15) 109 N.E. 109;

Southern Indiana Ry. Co. vs. Peyton, supra.

The New York Court of Appeals, holding that a statute permitted suit upon a money judgment, even though no such suit was possible at the time the judgment was entered, stated:

"It is the settled law that statutes relating to procedure are retroactive and prospective in their application without affirmative provisions to that effect." (Peace vs. Wilson (N. Y. '08), 79 N.E. 329, 330).

The same rule has been applied by many courts;

Bear Lake Irrigation Co. vs. Garland, 164 U. S. 1;

South Carolina vs. Gaillard, 101 U. S. 433;

Virginia & W. Va. Coal Co. vs. Charles (W. D. Va. '17), 251 P. 83, 127-128;

Carson vs. Miami Coal Co. (Ind. '23), 141 N.E. 810;

Woodvine vs. Dean (Mass. '07), 79 N.E. 882;

Stocker vs. Foster (Mass. '01), 60 N.E. 407;

First Methodist Episcopal Church vs. Fadden, (N. D. '92), 77 N.E. 615;

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Ensley vs. State (Okla. '10), 109 P. 230;

Baxter vs. Hamilton (Mont. '97), 51 P. 263.

Consequently, the burden of proof was upon the defendant to show that annual labor was not done either before or after the repeal of the Waskey Act. [266]

(Points X and XI also refer to matters which the appellant believes are not involved in this appeal and are therefore omitted.)

* * * *

XII.

The findings of fact set forth by the advisory jury in their verdict herein are confirmed as correct and adopted as the findings of the court.

Findings of fact and conclusions of law may be drawn pursuant to the above opinion.

Done at Fairbanks, Alaska, this 18th day of December, 1947.

HARRY E. PRATT,
District Judge. [273]

[Endorsed]: Filed Dec. 18, 1947.

[Title of District Court and Causes Nos. 5493-94.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 273 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5493 and 5494, entitled: United States Smelting, Refining, and Mining Company, a Maine Corporation,

Plaintiff, vs. Emma Grace Lowe, Defendant, and Gustaf Soderblom, Walter Jensen, and United States Smelting, Refining, and Mining Company, a Maine Corporation, Plaintiffs, vs. Emma Grace Lowe, Defendant, respectively, and was made pursuant to and in accordance with the Praecipe of the Plaintiffs and Appellees, and Defendant and Appellant, filed in this action, and by virtue of the said Appeal and Citation issue in said cause, and is the return thereof in accordance therewith, and I do further certify that the Index thereof, consisting of pages "a" and "b", is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "c", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to $31.75 has been paid to me by counsel of the appellant in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 7th day of June, 1948.

/s/ JOHN B. HALL,
Clerk.

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[Endorsed]: No. 11953. United States Circuit Court of Appeals for the Ninth Circuit. Emma Grace Lowe, Appellant, vs. United States Smelting, Refining and Mining Company, a Corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom and Walter Jensen, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Filed June 10, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 11953

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING & MINING COMPANY, a Corporation, et al,

Appellees.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now the appellant, Emma Grace Lowe, and submits herewith her statement of the points upon which she intends to rely on this appeal and

designates the parts of the record which she thinks are necessary for the consideration thereof, as follows:

I.

The points upon which appellant intends to rely and have determined upon this appeal are:

(1) The question of the implied repeal of the so-called Waskey Act (title 48, section 384, U.S. C.A.) by the 1938 amendment to section 381, title 48 and questions regarding the extent and effect thereof, appellant contending:

(a) That the Waskey Act was not repealed by the 1938 amendment to the 1900 statute because the 1938 amendment was not a new enactment, making the general mining laws applicable to Alaska, but such provision was merely copied word for word from the act of 1900 without change, the changes being with regard to entirely different provisions of the law. (mining on tide lands, etc.)

(b) Even if the Waskey Act had been impliedly repealed in 1938 such repeal would not affect the rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do the assessment work during the period while the Waskey Act was in force.

(c) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 amendment such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of

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labor and the presumption of non-performance arising from failure to file.

(2) Variance in the description of the Snow Shoe Fraction claim between the allegations of the complaint, etc., and recitals of the adverse claim and findings.

(3) The propriety of allowing and fixing attorneys' fees under the circumstances.

* * * *

Respectfully submitted:

/s/ HAROLD BANTA,
Attorney for Appellant.

(Duly Verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed October 1, 1948. Paul P. O'Brien, Clerk.

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No. 11953

United States

Court of Appeals

For the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Appellees.

Appeal from the District Court of the United States for the Territory of Alaska Fourth Judicial Division

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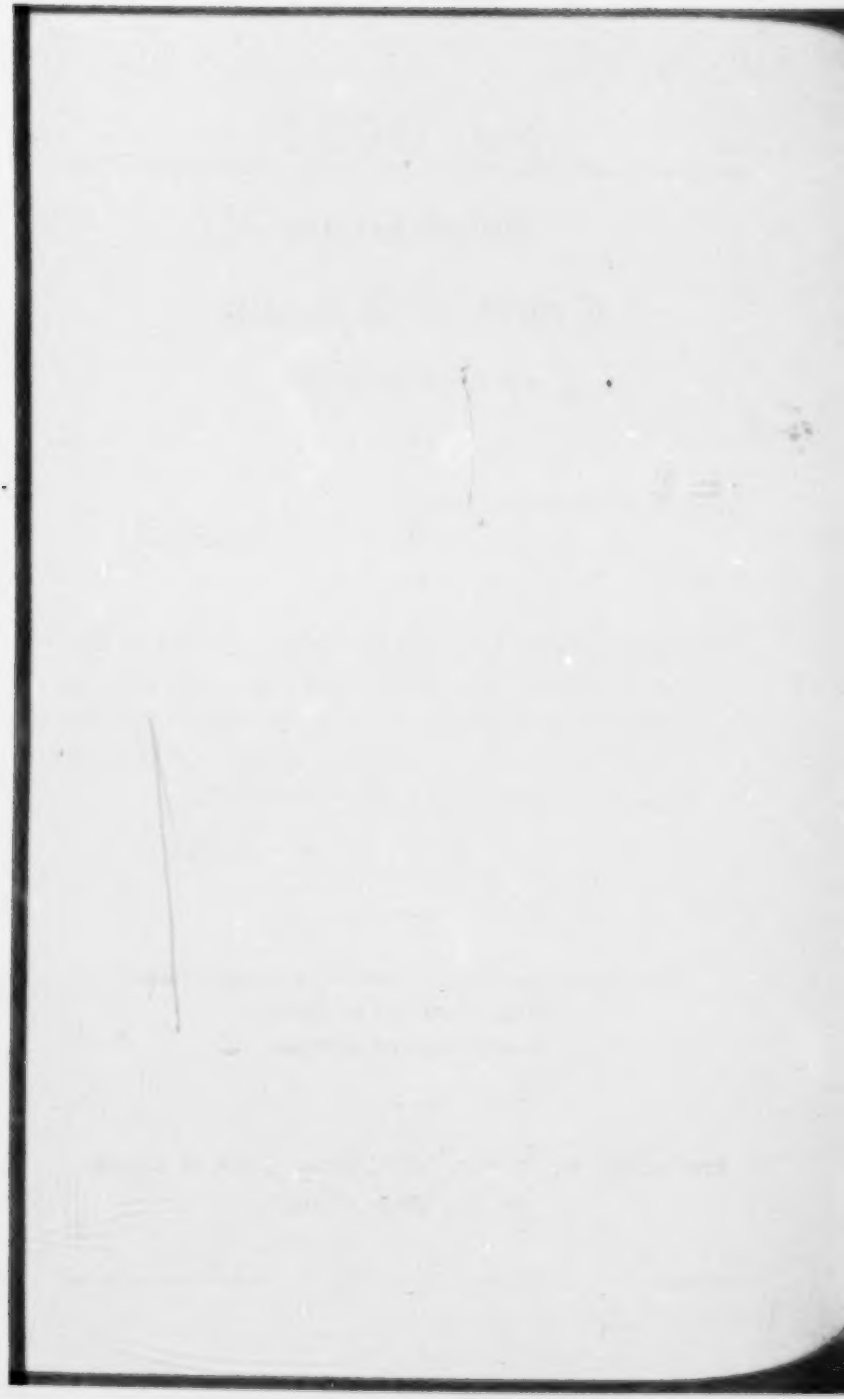
Proceedings had in the United States Court of Appeals for the Ninth Circuit



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United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, May 9, 1949.

Before: Healy, Bone and Pope,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Harold Banta, counsel for appellant, and—there being no appearance in open court on behalf of appellees—submitted on behalf of appellees on brief on file, and submitted to the court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, June 21, 1949.

Before: Healy, Bone and Pope,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith

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filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

In the United States Court of Appeals
for the Ninth Circuit

No. 11,953

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, and WALTER JENSEN,

Appellees.

Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Judicial Division.

Jun. 21, 1949

Before: Healy, Bone, and Pope,
Circuit Judges.

Healy, Circuit Judge.

OPINION

These are consolidated cases in which appellees sought and obtained judgment quieting their title to

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two placer mining claims situate in the Territory of Alaska. 74 F. Supp. 917. The claims had been located by appellees' predecessors in interest in 1908. In 1941 appellant made placer locations overlapping all or the major portion of the ground covered by the earlier locations, and subsequently she instituted in the United States Land Office proceedings to obtain patent. Appellees filed adverse claims in the proceeding and supported them with these suits. An advisory jury impaneled by the court returned a verdict finding that the 1908 locations were valid and that all required annual labor had been done by the claimants or their predecessors.

In the condition of the record, containing as it does no affirmative showing either way on the latter subject, the crucial inquiry is upon which party rested the burden of proof relative to the performance of annual labor. If by the law as it existed at the time of the trial the burden of proving performance was cast upon appellees the judgment below must be reversed, whereas if it was incumbent on appellant to prove non-performance an affirmance is indicated. The answer to the inquiry turns on the effect to be given certain acts of Congress pertaining to mineral locations in Alaska.

The first cause of §26 of Ch. 786 of the law of June 6, 1900, 31 Stat. 329, making further provision for the government of Alaska, provided that "the laws of the United States relating to mining claims,

mineral locations, and rights incident thereto, are hereby extended to the District of Alaska."[1] So far as concerns annual labor, the general mining law as it existed on June 6, 1900, and exists today, it contained in R. S. 2324 reading, so far as material, as follows: "On each claim located . . . and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. . . . but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It is familiar law that under this statute the good faith resumption and diligent prosecution of labor on a mining claim forestalls relocation notwithstanding prior failure to do the required representation work. Also, it is settled by the decisions that a junior locator who claims a forfeiture because of the failure of the locator or owner to perform annual labor has the burden of proving it by clear and convincing evidence. Hammer v. Garfield Mining Co., 130 U. S. 291, 301; Quigley v. Gillett, 101

[1]The remaining provisions of the section, not here pertinent, dealt with the right to mine for precious metals in the tidal waters of Bering Sea.

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Cal. 462; Lindley on Mines (3d Ed. 1914) Vol. 2, §645, pp. 1605-1606. This rule is not declared by the statute but is merely expressive of the traditional hostility of the law toward the enforcement of penalties and forfeitures. Lindley, supra, §645.

On March 2, 1907 Congress passed what is known as the Waskey Act, 34 Stat. 1243, shown on the margin.[2] That Act remained in full force and effect until 1938 when it would appear to have been in part superseded by a third act of Congress passed May 31 of that year. Two provisions of the Waskey

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[2]"An Act To Amend the laws governing labor or improvements upon mining claims in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claim shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose

Act are here of consequence. Upon failure of the locator or owner of a claim to comply with the annual labor requirement the claim is ipso facto forfeited, it being authoritatively held that the Act repealed by implication the resumption of labor provisions of the general mining laws as incorporated in the law of June 6, 1900. Thatcher v. Brown (9 Cir., 1911), 190 Fed. 708, 711; Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (9 Cir., 1914), 210 Fed. 599. The second provision of importance is of a procedural nature, quite distinct from the substantive provision relating to forfei-

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instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

. . . ."

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ture. It permits the filing for record by the locator or owner of an affidavit showing the performance of labor or the making of improvements in the requisite annual amount. Such affidavit, if duly filed, is made prima facie evidence of the performance of the work, whereas if it is not filed within the time prescribed the burden of proof is cast upon the claimant to establish performance.

We turn to the congressional legislation of May 31, 1938, 52 Stat. 588, previously noticed, the relevant portions of which are shown on the margin.[3] It re-enacts without change the opening clause of section 26 of the Act of June 6, 1900, extending the general mining laws to Alaska. As observed in footnote 1 above, section 26 as originally enacted opened for exploration and development shoal waters between low and mean high tide on the shores and inlets of Bering Sea. The legislative history of the 1939 amendment indicates that the

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[3] "To amend section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900 (31 Stat. 321), is amended to read as follows:

'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: . . . .' "

purpose of Congress was to extend this right to all the shores of Alaska;[4] and the remaining provisions of the amended section are entirely devoted to that subject. These provisions have no relevance here save to the extent they may serve to throw light on the intent of Congress. What is of prime significance is the fact that on the face of the statute the amended section restores to supremacy the general laws of Congress pertaining to mineral locations. Substantial effect must be given this flat and unequivocal provision unless we are prepared to believe that Congress did not intend what it said. If there was no thought at all other than to extend generally the privilege of mining under shore waters it would seem that only the portion of the section dealing with that subject would have been incorporated in the bill.

In the decision of the trial judge, and in the exceptionally able and helpful briefs of counsel on either side, much space is devoted to an analysis of the numerous authorities bearing on the problem presented by the re-enactment of a statute which, as here, has undergone intermediate amendment.[5] It is not thought necessary to burden this opinion

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[4]Consult H. Rep. No. 1648, 75th Cong., 3d Sess.

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[5]The general view on this subject is summarized in 50 Am. Jur., Statutes, §553, as follows: "A later law which is merely a re-enactment of a former law does not repeal an intermediate act which has qualified or limited the first one, but the intermediate act will be deemed to remain in force and

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with a repetition of the analysis. Enough to say that repeals by implication are regarded with disfavor; but where the latest legislative word on a subject is so incompatible with a previous enactment that the two can not exist together the courts have not hesitated to hold the earlier enactment repealed insofar as it is in conflict with the later. In Thatcher v. Brown, supra, this court thought the automatic forfeiture provision of the Waskey Act irreconcilable with the resumption of work provision of the general mining laws, hence it concluded that the latter was impliedly repealed. The court is now confronted with the obverse of that situation; and we are constrained to hold that the automatic forfeiture provision imported by the Waskey Act is no longer the law for Alaska, and that the more liberal rule of the general mining laws has been restored. Cf. Heinze v. Butte & B. Consol. Min. Co., 9 Cir., 107 Fed. 165.

The trial court believed that the 1938 Act effected a repeal of the Waskey Act in its entirety, including the provisions permitting the filing of an affidavit of the performance of assessment work and prescribing the effect on the burden of proof of

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to qualify or modify the new act in the same manner as it did the first."

Many of the cases indicate that the canon of construction stated is not applicable where the reenacting act and the intermediate act are so inconsistent with each other that they can not stand together. Consult cases cited in the opinion of the trial court, 74 F. Supp. 917, 922, and following.

the failure to file the affidavit. This is the fundamental thesis of appellees, also. We disagree. In the first place there is no irreconcilable conflict between the general mining laws and these adjective provisions of the Waskey Act, nor, indeed, is any inconsistency apparent.[6] As already noted, the general law of Congress does not itself declare where the burden of proof lies relative to the performance of annual labor. The rule casting the burden on the junior locator has been imported by the courts, not under the guise of statutory interpretation but rather as an application of a principle relating to forfeiture generally. In the second place, evidence is totally lacking that Congress by its 1938 legislation intended to disturb these useful and salutary

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[6]Many of the western states have statutes providing for the recording of proofs of labor. At least two of these statutes, those of Idaho and New Mexico (Sec. 47-606 Idaho Code; Compiled Laws of New Mexico 1897, §2315), contain virtually the same provisions as those of the Waskey Act relative to the shifting of the burden of proof. If these local enactments are inconsistent with the paramount mining laws of Congress they could hardly have escaped condemnation during the many decades they have been on the books, yet so far as we are advised their validity has never been successfully challenged. In discussing the Idaho and New Mexico statutes Lindley has expressed the view that this class of state legislation is unobjectionable. "The several states," he observes, "have a right to define the nature, degree, and effect of evidence, within rational limits, and we do not think these provisions unreasonable." Lindley on Mines, 3d Ed., §636, p. 1583.

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provisions of the Waskey Act—provisions which serve fairly to implement its existing laws.

Finally, we turn to the condition of the record and to the bearing this discussion has upon the case before us. During many of the years intervening between 1908 and 1938—years unaffected by the occasional suspensions by Congress of the annual labor requirement—no affidavit of performance of labor appears to have been filed in respect of appellees' locations, nor does the record contain evidence that labor was actually performed on the claims in any of such years. In short, appellees failed on the trial to discharge the burden of proof of performance cast upon them by the currently extant procedural provisions of the Waskey Act. It is true that they made a substantial showing of the resumption and diligent prosecution of work on the claims in the year 1940, prior to appellant's relocation of the ground; but this showing avails them nothing if their rights had become forfeited in the earlier years through noncompliance with the then existing law. Concededly the repeal of the automatic forfeiture provision of the Waskey Act did not operate to restore rights already lost. It was therefore incumbent upon appellees to come forward with evidence tending to show that their rights survived the period in which any failure to represent the claims would ipso facto eventuate in their forfeiture to the United States. In this state of the

proof the district court was obliged to find for the appellant, and the judgment must be reversed.

The district court made no finding in respect of the validity of appellant's locations, on the theory, no doubt, that a finding of that nature was unnecessary in view of the conclusion reached. Presumably findings on that subject can be made on the present record, but if thought necessary further evidence may be taken on the point.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[Endorsed]: Opinion. Filed June 21, 1949. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 11953

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, et al.,

Appellees.

JUDGMENT

Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

This Cause came on to be heard on the Tran-

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script of the Record from the District Court of the United States for the Territory of Alaska, Fourth Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellees, and that this cause be, and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this court.

It Is Further Ordered and Adjudged by this Court that the appellant recover against the appellees for her costs herein expended, and have execution therefor.

Filed and entered June 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, September 22, 1949.

Before: Healy, Bone and Pope,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING, ETC.

Upon consideration thereof, and by direction of Circuit Judges Healy and Bone, It Is Ordered that

the petition of appellees, filed July 20, 1949, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

By direction of Circuit Judge Pope, Ordered his dissenting opinion upon denial of petition for rehearing be forthwith filed by the clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 11953

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, et al.,

Appellees.

Sept. 22, 1949

Before: Healy, Bone and Pope,
Circuit Judges.

The petition for rehearing is denied.
Pope, Circuit Judge, dissenting:

DISSENTING OPINION

I dissent from the order denying the petition for rehearing for the reason that in my opinion our judgment should be amended so as to remand the

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cause for a new trial to permit appellee to offer evidence of the performance of annual labor upon its claims.

It is true that when the case was tried, appellee proceeded upon the theory that such proof was not required, a view with which the trial court promptly agreed. In doing so appellee was not acting recklessly. We have just finished deciding, now for the first time, an important question of property law for Alaska. It is a matter which previously has been in doubt, and I do not think the appellee should be forever foreclosed from showing, if it can, that the claims were represented, merely because its attorneys took too advanced a position on the former trial.

After all, the only important question is, who owns these claims? If there be evidence available upon this question I think the court below should not be prevented from hearing it, merely by a process of reasoning that since appellee made the first error it should now be forever barred. I think such a case should never be terminated until the right of the matter has been finally found on the basis of the available evidence.

I think the new trial of this issue is particularly called for here, for (1) the appellant's own pleadings presented her allegations of non-performance as "affirmative matter," thus apparently, before trial, taking the same view as did the appellee, and (2) the matter is before us without a complete transcript, but only upon a fragmentary record in a bill

of exceptions, and we are thus without information as to all that transpired below.

Stewart, Administrator, v. Southern Railway Co., 315 U.S. 283, represents what I think is the only proper procedure here. There, both the Supreme Court and the Court of Appeals were agreed that plaintiff had failed to make a case in the district court. The Court of Appeals had reversed with directions to enter judgment for defendant, Southern Ry. Co. v. Stewart, 119 F. 85. The Supreme Court remanded the cause to the court below for the purpose of permitting the taking of further testimony of one of the witnesses, a railroad switch crew foreman, who had been upon the stand at the former trial, but who had not been interrogated by either party with respect to the question of fact which was held to be decisive. The court said: (P. 286) "We hold that, on this record, neither party is entitled to prevail. If the issue as to the condition of the coupler mechanism was determinative, a new trial should have been ordered so that this issue might have been resolved in the light of a full examination of the foreman, the witness who could have given further testimony on the subject."

I do not think that decision can be squared with an attitude on our part that because appellee could have presented the evidence of annual labor before, and did not do so, it must now lose its mining claims.

If a first mistake on a former trial has such significance as to require the party mistaking his

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rights or remedy to lose his case, then there is no justification for the many decisions permitting a losing party not only a new trial after a reversal, but the privilege of amending his pleadings as well. That procedure is commonplace.

In Wiggins Ferry Co. v. O. & M. Railway, 142 U.S. 396, the intervenor had proceeded in the court below upon a wholly erroneous theory that it was entitled to compensation for use and occupation of certain premises because of a relationship of landlord and tenant. The Supreme Court while reversing the decision of the court below on this ground remanded the cause for further proceedings with permission to amend the pleadings and permit proof of an amended claim, saying at page 415: "We have shown that the inference it draws from all this, namely, that it is entitled to have a just and reasonable compensation for the use and occupation of said premises, is untenable, but it does not necessarily follow that it is wholly remediless. Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of

the appellate court to permit such amendment to be made."

Here, in the instant case, I think that "a mistaken view of one's rights or remedies should not be permitted wholly to defeat" a claim which the evidence might well show to be "founded upon principles of equity and justice."

[Endorsed]: Dissenting Opinion of Pope, C. J., on Petition for Rehearing. Filed Sept. 22, 1949. Paul P. O'Brien, Clerk.

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United States Court of Appeals
for the Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing 190 pages, numbered from and including 1 to and including 190, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 5th day of December, 1949.

[Seal] PAUL P. O'BRIEN,
Clerk.

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In the Supreme Court OF THE United States

Office - Supreme Court, U. S.
FILED
DEC 19 1949
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1949

No. 489

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,

Petitioners,

vs.

EMMA GRACE LOWE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
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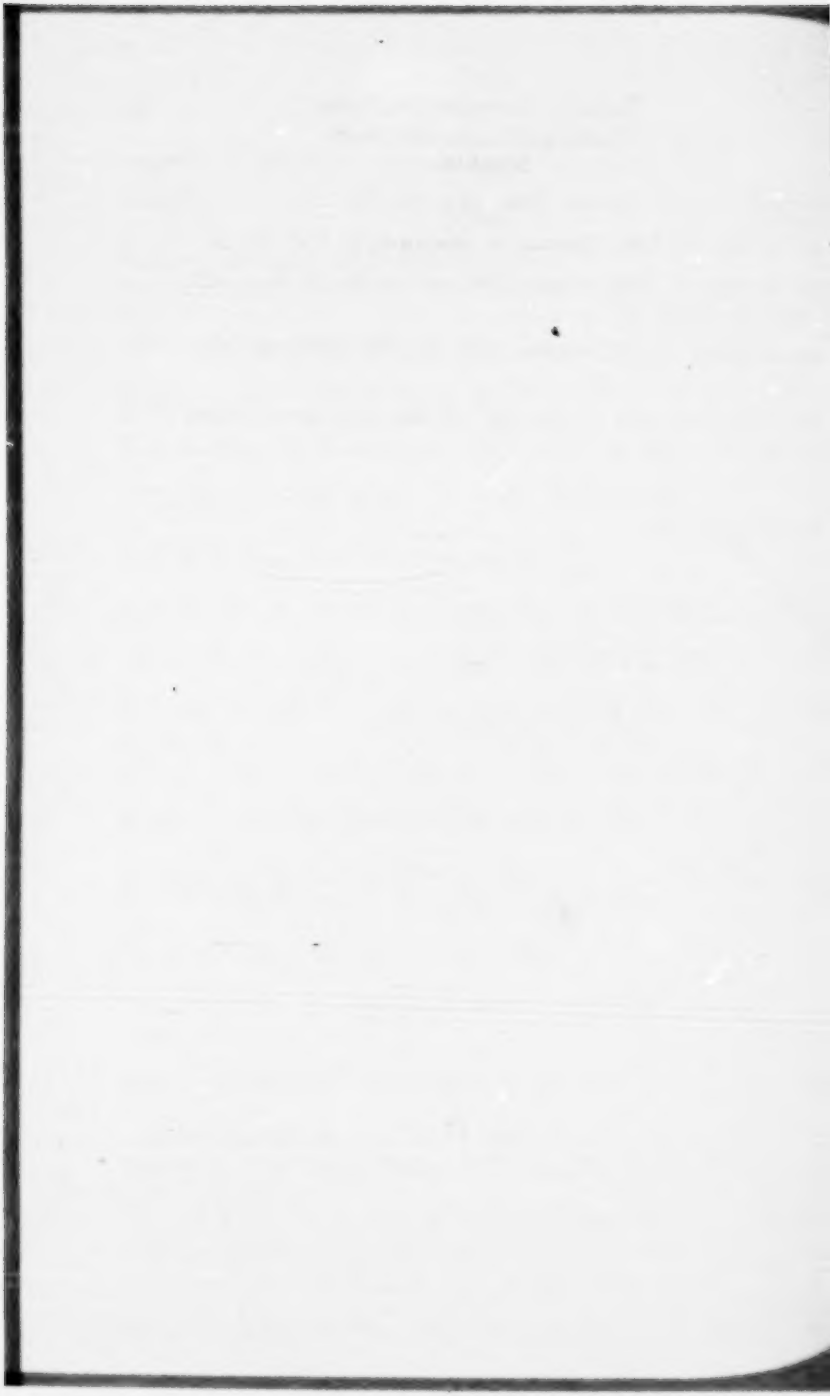

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No.

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,

Petitioners,

vs.

EMMA GRACE LOWE,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari be issued to review the judgment of

the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause (R. 184), reversing the decree of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division (R. 63).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court are set forth in the record at pages 53 to 62, and its opinion (R. 144) is reported in 74 F.Supp. 917. The opinion (R. 174) of the Court of Appeals is reported in 175 F.2d 486. The dissenting opinion of Pope, J., on rehearing (R. 186) is reported in 176 F. 2d 813.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 21, 1949. Petitioners filed their petition for a rehearing on July 20, 1949, and said petition was denied on September 22, 1949. Jurisdiction of this court is invoked under sections 1254 and 2101 of the Judicial Code (Act of June 25, 1948, c. 646; 62 Stat. ....., 28 U.S.C. 1254, 2101).

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix to this petition, and are as follows:

Revised Statutes, Section 2324; 30 U.S.C. 28;

Act of May 17, 1884, c. 53, sec. 8; 23 Stat. 24, 26;

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Act of June 6, 1900, c. 786, sec. 26; 31 Stat. 321, 329; 48 U.S.C. 381 (hereinafter referred to as the "1900 Act");

Act of March 2, 1907, c. 2559; 34 Stat. 1243; 48 U.S.C. 384 (hereinafter referred to as the "Waskey Act");

Act of May 31, 1938, c. 297; 52 Stat. 588; 48 U.S.C. 381 (hereinafter referred to as the "1938 Act").

STATEMENT OF THE CASE.

The primary question in this case concerns the laws of the United States applicable to Alaska relating to gold placer mining claims and their forfeiture for alleged failure to do annual assessment work. Until 1907 it was the law in Alaska, as in the United States, that annual assessment work be done on or for each mining claim and that if such work was not done the ground could be located by a stranger unless the owner of the claim had in good faith resumed his labor prior to such location (R.S. 2324; 30 U.S.C. 28). An equally important and settled law was that announced by Justice Field, when the laws of the United States relating to mining claims were being developed, that a junior locator claiming a forfeiture by reason of the failure of the senior locator to do his work had the burden of proving that failure *(Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291).

By section 26 of the Act of June 6, 1900, Congress, as it had by section 8 of the Act of May 17, 1884, in similar language, extended to the Territory of Alaska "The laws

of the United States relating to mining claims, mineral locations, and rights incident thereto * * *."

In 1907 Congress passed the Waskey Act, applicable only to Alaska, which omitted the resumption of labor provision of Revised Statutes, section 2324, and provided for automatic forfeiture in the event of any failure to do the required work. The Waskey Act also provided that the owner *may* file an affidavit of performance of labor and that such affidavit was prima facie evidence of such performance; but if such affidavit was not filed the burden of proof should be upon the claimant to establish performance of such labor.

In 1938 when Congress amended the Act of June 6, 1900, in other respects, it re-enacted the provision of the 1900 Act which extended the mining laws of the United States to Alaska.

This case arises out of a dispute concerning the right to gold placer mining ground included in overlapping claims of petitioners and respondent. Petitioners' claims, The Snow Shoe Fraction and the L Association, were located in 1908, five years after gold was first struck in the Fairbanks district, and no question was ever raised concerning their validity or the titles of petitioners or their predecessors in interest until 1941, when respondent, for herself and another, staked out overlapping claims covering all of petitioners' The Snow Shoe Fraction and nearly all of the L Association. In 1945, respondent commenced proceedings to patent her overlapping junior claims. Petitioners duly filed adverse claims in the Land

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Office and commenced two quiet title actions in the District Court for the Territory of Alaska, Fourth Judicial Division (R. 2, 6) in support thereof.

The cases were consolidated for trial and an advisory jury gave its verdict in favor of petitioners, specifically finding that they and their predecessors as owners of the senior claims had not failed to do the required annual labor (R. 46).

The District Court made and filed its findings of fact and conclusions of law (R. 53), finding that the required annual labor had been performed upon each of petitioners' claims or that valid notices of intention to hold said claims had been filed (R. 58), and on April 6, 1948, said court made and entered its decree, quieting petitioners' titles to The Snow Shoe Fraction and the L Association (R. 63).

Respondents appealed to the Court of Appeals for the Ninth Circuit, and on June 21, 1949, the Court of Appeals entered its opinion and judgment reversing the decree of the District Court and remanding the cause for further proceedings (R. 174, 184). The Court of Appeals ruled as follows:

1. The automatic forfeiture provisions of the Waskey Act were repealed by the 1938 Act.

2. The burden of proof provisions of the Waskey Act were not repealed by the 1938 Act.

3. Petitioners had failed to prove the performance of the required annual labor.

4. The case should be returned to the District Court for findings in respect of the validity of respondent's locations.

On July 20, 1949, petitioners filed with the Court of Appeals their petition for a rehearing, and on September 22, 1949, said petition was denied (R. 185), one judge dissenting (R. 186).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals for the Ninth Circuit erred:

1. In holding that the 1938 Act did not repeal the burden of proof provisions of the Waskey Act.

2. In holding that the petitioners had failed to prove annual labor.

3. In remanding the cause for findings in respect to the validity of respondent's locations and not allowing petitioners the right to a further hearing in the District Court on the question of the performance of annual labor by them and their predecessors in interest.

REASONS FOR GRANTING THE WRIT.

INTRODUCTION.

The rule of *Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, is that when a junior locator of a mining claim alleges that a senior location is void for failure to perform the annual labor required under R.S. 2324, the burden is upon the junior locator to prove such failure by clear and convincing evidence. The rule of the Waskey

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Act is that in such a situation, if the senior locator has not filed an affidavit of performance, the burden shall be upon him affirmatively to prove labor. The issue in both instances is the same: Was the labor done? Obviously, the burden of proving the affirmative and the negative of this issue cannot be put on the senior and junior locators, respectively, at the same time; it can be on only one or the other. The two rules are contradictory and cannot apply in the same jurisdiction at the same time in the same cause.

The Court of Appeals does not deny this contradiction. It avoids it. It says that the rule of *Hammer v. Garfield Mining Co.*, supra, is not part of "The laws of the United States relating to mining claims, mineral locations and rights incident thereto * * *," which were extended to Alaska in 1884, 1900, and again in 1938. In its decision, however, the Court of Appeals did not use the language of the statutes, which spoke of the laws "of the *United States.*"* Rather it used phrases such as "the general mining laws" and "the general law of Congress," which do not appear in any statute bearing upon the problem. We quote the reasoning of the Court of Appeals on which it bases its decision (R. 182):

> "In the first place there is no irreconcilable conflict between the general mining laws and these adjective provisions of the Waskey Act, nor, indeed, is any inconsistency apparent. As already noted, the general law of Congress does not itself declare where the burden of proof lies relative to the performance of annual labor. The rule casting the burden on the junior locator has been imported by the courts, not

*Italics supplied throughout.

> under the guise of statutory interpretation but rather as an application of a principle relating to forfeiture generally."

The question thus raised by the Court of Appeals is simply this: Is the burden of proof rule of *Hammer v. Garfield Mining Co.*, supra, a part of "The laws of the United States relating to mining claims, mineral locations and the rights incident thereto"?

This question, concerning as it does the construction and application of the mineral land laws, is of general interest and importance in all regions where those laws are operative, including Alaska. For this reason, as well as for the reasons set forth below, we urge this court to grant its writ of certiorari, as it did in the mining case of *Cole v. Ralph* (1919) 252 U.S. 286, 289.

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1. **THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.**

The Court of Appeals has reversed itself and every district court which has ever had occasion to consider the applicability of *Hammer v. Garfield Mining Co.*, supra. Never before has it been doubted that the burden of proof rule of that case was a part of the laws of the United States.

The Court of Appeals itself has so ruled.

Moodey v. Dale Consol. Mines (9 Cir. 1936) 81 F. 2d 794;

Betsch v. Umphrey (9 Cir. 1918) 252 Fed. 573;

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Walton v. Wild Goose Mining & Trading Co. (9 Cir. 1903) 123 Fed. 209, certiorari denied 194 U.S. 631.

The Alaskan district court has so ruled.

Debney v. Iles (1907) 3 Alaska 438;
Bakke v. Latimer (1906) 3 Alaska 95.

District courts in other districts have so ruled.

Wailes v. Davies (D.Nev. 1907) 158 Fed. 667;
Zerres v. Vanina (D.Nev. 1905) 134 Fed. 610;
Willitt v. Baker (W.D.Ark. 1904) 133 Fed. 937;
Justice Min. Co. v. Barclay (D.Nev. 1897) 82 Fed. 554.

As the court stated in *M'Culloch v. Murphy* (D.Nev. 1903) 125 Fed. 147 (p. 150):

"The law does not favor forfeitures. The penalty for failure to comply with the law is thus expressed in section 2324, Rev. St. [U.S. Comp. St. 1901, p. 1426]: 'Upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made.' The word 'forfeiture' is not used in the statute, although it is a comprehensive word to express results which flow from a failure to comply with the law. The rule is well settled that the forfeiture cannot be established except upon clear and convincing proof of the failure of the original locator to have work performed or improvements made to the amount required by law. The burden of proof to establish a forfeiture rests upon him who asserts it. Hammer v. Garfield M. & M. Co., 130 U.S. 291, 301, 9 Sup. Ct. 548, 32 L. Ed. 964; Book v. Justice M. Co., supra;

Justice M. Co. v. Barclay (C.C.) 82 Fed. 554, 559; Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Axion M. Co. v. White, 10 S.D. 198, 201, 72 N.W. 462."

The Court of Appeals has thus overturned precedents of over fifty years' standing.

Over the period of years since *Hammer v. Garfield Mining Co*, supra, was decided in 1889, this procedural law has become more important to the miner than the substantive laws of resumption of labor and automatic forfeiture. This fact is most clearly seen when the problem is placed in its proper setting. This Court of Appeals decision is important to miners and the Alaskan mining industry because the evidence is rapidly drying up. Mining is a transient business, and miners, especially the old "sourdoughs," are nomadic types. Furthermore, the generation which originally located and developed Alaskan mining claims is fast dying off. Because of wilderness conditions, lack of transportation, and the like, only in recent years has there been any serious effort to record assessment work, that is, filing affidavits of annual labor. Therefore, the person who has the burden of proving that annual labor was or was not done twenty, thirty or forty years ago has a particularly difficult task. To say at this late date that the burden of proof is not a part of the laws of the United States relating to mining claims is to ignore the decisions of this court and all inferior federal courts, and to ignore the practical facts of American mining.

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2. **THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

The decision of the Court of Appeals is based upon the assumption that the rule of *Hammer v. Garfield Mining Co.*, supra, was not developed as a matter of statutory interpretation. This assumption is incorrect, and the holding of the Court of Appeals is in conflict with prior decisions of this court, on this very point.

Revised Statutes, section 2324, require that the owner of a mining claim perform a certain amount of labor annually on or for his claim. The statute further provides for a forfeiture in the event he fails to do so and does not resume labor prior to location by a stranger. Nothing is said, however, as to whether, in an action between a junior and a senior locator, performance or failure to perform must be proved.

Hammer v. Garfield Mining Co., supra, arose under this statute, which was and is without a doubt a part of "The laws of the United States relating to mining claims, mineral locations and the rights incident thereto * * *." Faced with the conflicting claims of a junior and a senior locator and with the absence in Revised Statutes, section 2324, of any provision for burden of proof, this court had to settle the question itself. It was necessary to determine who had the burden of proving the issues raised by the statute. This the court did, and *under the statute* it held:

> "As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretence of a forfei-

> ture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk v. Meager*, 104 U.S. 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." *(Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, 301, per Field, J.).

The holding of the Court of Appeals that the rule of the *Hammer* case was not the result of statutory interpretation is refuted by the very facts of the *Hammer* case. The holding is further refuted by this court in *El Paso Brick Co. v. McKnight* (1914) 233 U.S. 250, wherein it was said (pp. 259-260):

> "This conclusion makes it unnecessary to decide the question as to whether the territorial statute, imposing upon the locator the burden of proving that he has performed the annual assessment work, is void as being in conflict with the Federal statutes, which require no such annual proof, raise no presumption of abandonment and *as construed in Hammer v. Garfield*, 130 U.S. 291, demand clear and convincing proof that work has not been done before a forfeiture can be declared."

The Supreme Court, in a case arising under a law of Congress and interpreting that law, necessarily evolved a law on burden of proof, and:

> "It is not now disputed that when any question, arising under the laws of the United States, has

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been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior national courts. No issue growing out of any statute, which has been once so adjudicated, can be said to involve in its determination the construction of such statute. It has been construed; there is nothing left to construe. All there is left is to follow the construction given" (*Inez Min. Co. v. Kinney* (D.Idaho 1891) 46 Fed. 832, 834).

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3. **THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

The Court of Appeals has held that petitioners failed to prove annual labor during certain years between 1908 and 1938. This decision finally disposes of petitioners' rights, although respondent is given an opportunity to prove her affirmative allegations respecting her purported claims. Thus, almost two years after the trial, and contrary to the theory upon which the case was tried, the burden of proving labor is put on petitioners, and they are given no opportunity to support that burden.

Assuming that as a matter of law the ruling of the Court of Appeals shifting the burden of proof is correct, it can hardly apply retroactively to a trial conducted on the opposite theory and thus deny to petitioners the right to introduce evidence on a question as to which the trial court ruled they had no duty to offer evidence. It has long been the rule that if the record on appeal does not adequately reveal material facts or if the wrong theory has been

adopted in the trial court, the proper course is to remand the case so that *both* sides may have an opportunity to complete the record.

Stewart v. Southern Ry. Co. (1942) 315 U.S. 283;
Willing v. Binenstock (1937) 302 U.S. 272;
Villa v. Van Schaick (1936) 299 U.S. 152;
Security Mortgage Co. v. Powers (1928) 278 U.S. 149;
Marconi Wireless Co. v. Simon (1918) 246 U.S. 46;
United States v. Rio Grande Irrigation Co. (1902) 184 U.S. 416;
Wiggins Ferry Co. v. O. & M. Railway (1892) 142 U.S. 396.

Chief Justice Marshall is even reported to have said that "when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below" (*Hudson v. Guestier* (1810) 6 Cranch 281, footnote p. 285).

There can be no doubt that in fact the burden was upon respondent in the District Court. She assumed it in her answers by raising the issue of labor as a matter an affirmative defense (R. 14, 23), the trial judge consistently ruled that she had the burden (R. 80, 88-90, 98, 102-105, 112), and the jury was so instructed (R. 36).

By its decision on the question of proof, the Court of Appeals has put itself on the horns of a dilemma. Since, as that court points out (R. 175), the record on appeal contains no affirmative showing either way on the issue

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of labor, there are only the verdict of the jury and the findings of the trial court on which to base a decision. The verdict was that petitioners did not fail to do the labor (R. 46); the findings state that the labor was done (R. 58). Only two alternative inferences may be drawn from the record on appeal:

1. The work was done. The verdict and the findings support this conclusion, and there being no evidence to the contrary in the record (R. 175), the judgment must stand.

The City v. Babcock (1865) 3 Wall. 240;
Russell v. Ely, et al. (1862) 2 Black 575.

2. The work was not done. There is no evidence in the record to support this conclusion. Nevertheless, if this be the correct inference, and if the burden should properly have been put on petitioners, the fact remains that during the trial that burden was actually put on respondent, and petitioners then had no duty to offer evidence relating to matters pertaining to respondent's affirmative defense.

It follows either that the Court of Appeals erred in ruling that petitioners had failed to prove labor or that it erred in denying to petitioners (although granting to respondent) the right to a further hearing under the rules of law as changed by that court. Whichever be the case, the Court of Appeals should be directed to correct its error.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
December 14, 1949.

Respectfully submitted,

SOUTHALL R. PFUND,

Attorney for United States Smelting Refining and Mining Company, a corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom, deceased, and Walter Jensen, Petitioners.

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

(Appendix Follows.)

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Appendix

Revised Statutes, Section 2324; 30 U.S.C. 28:

"Mining district regulations by miners; annual labor on claims pending issue of patent; expenditure on tunnels considered

The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims made after May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the 10th day of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open

to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several coowners to contribute his proportion of the expenditures required hereby, the coowners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coowner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coowners who have made the required expenditures. The period within which the work required to be done annually on all unpatented mineral claims located since May 10, 1872, including such claims in the Territory of Alaska, shall commence at 12 o'clock meridian on the 1st day of July succeeding the date of location of such claim.

Where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since May 10, 1872; and such person or company shall not be required to perform work on the surface of said lode or lodes in

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order to hold the same as required by this section. On all such valid claims the annual period ending December 31, 1921, shall continue to 12 o'clock meridian July 1, 1922. R.S. §2324; Feb. 11, 1875,c. 41, 18 Stat. 315; Jan. 22, 1880,c.9, §2, 21 Stat. 61; Aug. 24, 1921,c.84, 42 Stat. 186."

Act of May 17, 1884, chapter 53, section 8; 23 Stat. 24. 26:

"Sec. 8. That the said district of Alaska is hereby created a land district, and a United States land-office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land-office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: * * *."

Act of June 6, 1900, chapter 786, section 26; 31 Stat. 321, 329; 48 U.S.C. 381:

"Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident

thereto are hereby extended to the District of Alaska: *Provided,* That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea op-

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posite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes,' shall not apply to mineral lands or town sites."

Act of March 2, 1907, chapter 2559; 34 Stat. 1243; 48 U.S. C. 384:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon;

third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded.

Approved, March 2, 1907."

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Act of May 31, 1938, chapter 297; 52 Stat. 588; 48 U.S.C. 381:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 26, title I, chapter 1, of the Act entitled 'An Act making further provision for a civil government for Alaska, and for other purposes', approved June 6, 1900 (31 Stat. 321), is amended to read as follows:

'Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: *Provided*, That, subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, all land and shoal water between low and mean high tide on the shores, bays, and inlets of Alaska, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of the Interior authorizing any person or persons, corporation or company, to excavate or mine under any of said waters below low

tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of the Interior may prescribe for the preservation of order; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes", shall not apply to mineral lands or town sites.'

Approved, May 31, 1938."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 489

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, deceased, and WALTER JENSEN,
Petitioners,

vs.

EMMA GRACE LOWE,
Respondent.

PETITIONERS' REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Respondent's arguments *ad hominem* and disclaimed pleas for sympathy are no more relevant to the matter in hand than would be a statement by petitioners that

respondent was an habitual claim jumper doing her prospecting in the local recorder's office. An important and substantive matter of law remains to be answered, and such arguments neither gainsay this fact nor contribute to the solution.

Respondent's answers to petitioners' argument (Resp. Br., pp. 9-17, 17-24, 24-29) are amply covered in the Petition (pp. 8-10, 11-13, 13-15) and require no further consideration.

Her "ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED" (Resp. Br., pp. 29-33), however, is one which petitioners have not previously had an opportunity to discuss. Assuming that the 1938 Act repealed the burden of proof provision of the Waskey Act, respondent contends that the 1938 Act also repealed the Act of June 7, 1910 (36 Stat. 459, 48 U.S.C. 386), which extended in Alaska the time in which to file adverse claims and suits beyond the time allowed in the United States by the Act of May 10, 1872 (17 Stat. 91, 93), as amended (30 U.S.C. 29, 30).

In addition to the fact that this contention has nothing to do with the repeal of the burden of proof provision of the Waskey Act, which is the question before this court, respondent is clearly without right to raise it now almost four years after the complaints were filed and more than two years after the trial. Although the times of filing the adverse claims in the Land Office were stated in the complaints (R. 4, 9) and the dates of filing the complaints were endorsed on them (R. 5, 10), respondent did not move against them, demur or raise the point in her answers (R.

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10, 20). She did not raise it during the trial or in the Assignment of Errors (R. 75), in the Bill of Exceptions (R. 87) or in the Statement of Points to be Relied Upon in the Court of Appeals (R. 167).

Respondent injected the question of the time for filing into these proceedings for the first time in her reply brief on appeal to the Court of Appeals. The weight which that court gave to this point is indicated by the complete absence of any reference to it in the court's opinion (R. 174; 175 F.2d 486), and respondent has failed to file a cross petition for a writ of certiorari raising the question.

The precise point, whether the failure to file an adverse claim or suit within the time allowed by 30 U.S.C. 29, 30, may be raised for the first time on appeal, has been decided in the negative by the Supreme Courts of Arizona and Colorado.

Hain v. Mattes (1905) 34 Colo. 345, 83 Pac. 127;

Pennsylvania Min. Co. of Colorado v. Bales (1902) 18 Colo. App. 108, 70 Pac. 444;

Providence Gold-Min. Co. v. Marks (1900) 7 Ariz. 74, 60 Pac. 938;

Marshall Silver Min. Co. v. Kirtley (1889) 12 Colo. 410, 21 Pac. 492.

Exactly the same answer was given by this court as an alternative basis for decision in *Richmond Mining Company v. Rose* (1884) 114 U.S. 576.

The statute fixing the time in which to file adverse claims and suits is a statute of limitations. It does not go to the jurisdiction of the trial court and may be waived by the

person entitled to claim its benefits. Having waived the statute in the trial court, respondent is not entitled to raise it on appeal.

Retzer v. Wood (1883) 109 U.S. 185;
Upton v. McLaughlin (1881) 105 U.S. 640.

For the foregoing reasons, because of the importance of the burden of proof question in this case as a matter of statutory construction, and because of its importance to the future development of Alaskan mines, which constitute the second largest industry of the Territory, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 26, 1950.

Respectfully submitted,
SOUTHALL R. PFUND,
Attorney for United States Smelting Refining and Mining Company, a corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom, deceased, and Walter Jensen, Petitioners.

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM 1949

No. 489

UNITED STATES SMELTING, REFINING AND MINING COMPANY, a Corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom and WALTER JENSEN,

Petitioners,

vs

EMMA GRACE LOWE,

Respondent.

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S STATEMENT ON OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

Respondent accepts Petitioners' statement (pages 2

and 3 Petition) setting forth the identity and citations of the opinions below and the statutes involved. Respondent does not question the jurisdiction of this court to grant Certiorari but does contend that there are very definite reasons, which will hereafter more fully appear why the court in the exercise of its discretion should decline to grant the writ in this instance.

RESPONDENT'S STATEMENT OF THE CASE

These two cases (consolidated for trial) are a type of litigation once very common during the heyday of gold mining in the Western United States and Alaska but now becoming increasingly rare. They are contests between rival claimants to placer mining claims located upon the public domain. Although as their counsel state (page 4 Pet.) the petitioners' claims (the L Association and Snow Shoe Fraction) were located as early as 1908 none of the ground was ever mined and no substantial development work had been performed prior to the time Respondent and her associate located a portion of the ground in 1941. Respondent's adverse locations are called the Jupiter Association, Scorpion Association and Saturn. The Jupiter and Scorpion Associations contain approximately 40 acres each and the Saturn 20 acres so that there are only 100 acres involved. The relocations were

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made because respondent believed that the earlier locations had been forfeited and the ground rendered subject to relocation by failure to do the annual assessment work or claim suspension when available during many of the years that had intervened since the original locations. At that time the public records disclosed that during the vast majority of these years there had been no proofs of labor or suspension notices filed upon either claim (See pages 100-101 Tr.). After relocating the ground in dispute Respondent performed the development work required to qualify the claims for patent and commenced patent proceedings. Petitioners filed adverse claims in the land office and commenced these proceedings. Upon the trial in the District Court Petitioners' theory, which they were successful in getting the trial Judge to adopt was that the Waskey Act (48 U.S.C.A. Sec. 384, pages V-VI Appendix Pet.) was implied repealed as a whole by the 1938 Amendment to the 1900 Law. (48 U.S.C.A. 381, pages VII-VIII, III-V Appendix Pet.) In accordance with this theory the Trial Judge ruled out all the evidence offered by Respondent to the effect that proofs of labor and suspension notices had not been filed upon the claims during many of the years intervening prior to 1938 while the Waskey Act was unquestionably in effect, (Exceptions 2 to 4, pages 90 to 102 Tr.) and in effect instructed the Advisory Jury to return a verdict for the petitioners. After the verdict of the Advisory Jury was received the

Trial Judge being in doubt as to the correctness of his rulings requested briefs on the law from counsel for the respective parties which were submitted. After considering the briefs the Judge handed down a detailed written opinion reaffirming his previous conclusions which is reported in 74 Federal Supplement 917. Respondent then appealed to the Circuit Court of Appeals which directed a reversal. The Respondent's contentions in the Circuit Court of Appeals as set out in her statement of points to be relied on, as regards the implied repeal of the Waskey Act, (page 168 Tr.) are as follows:

> "(a) That the Waskey Act was not repealed by the 1938 Amendment to the 1900 Statute because the 1938 Amendment was not a new enactment, making the general mining laws applicable to Alaska, but such provision was merely copied word for word from the Act of 1900 without change, the changes being with regard to entirely different provisions of the law. (mining on tidelands, etc.)
>
> (b) Even if the Waskey Act had been impliedly repealed in 1938 such repeal would not affect the rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do the assessment work during the period while the Waskey Act was in force.
>
> (c) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 Amendment such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of labor and the presumption of non-performance arising from failure to file."

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The Circuit Court of Appeals in its opinion refused to adopt Respondent's proposition (a) and held that the 1938 Amendment had impliedly repealed the automatic forfeiture clause of the Waskey Act. (175 Fed. 2nd at page 489) The Circuit Court of Appeals did, however, approve Respondent's propositions (b) and (c) (175 Fed. 2nd on 489-90) and directed a reversal and the entry of decree in Respondent's favor. Petitioners have now applied to this court for a Writ of Certiorari. Petitioners contend that the rule of law announced by Hammer vs Garfield Mining Company and the many other similar decisions in the Territorial, State and Federal Courts, to the effect that forfeiture is an affirmative defense which must be pleaded by the party relying upon it and must be established by clear and convincing proof, is part of the judicial interpretation of the mining laws of the United States and as such is inconsistent with the burden of proof provisions of Alaska's Waskey Act and impliedly repealed those provisions, when the 1938 Amendment, which as petitioners contend and the Circuit Court of Appeals held impliedly repealed the undoubtedly inconsistent automatic forteiture clause, was enacted (See pages 8 to 13 Pet.). Petitioners state:

> "The Court of Appeals has thus overturned precedents of over fifty years standing." (page 10 Pet.)

Respondent on the other hand contends that Hammer vs Garfield Mining Company and that many federal and

state cases which announce the same doctrine merely affirm a rule of pleading and proof which has always been the law and has its basis not in any of the provisions of the mining code but rather in the traditional reluctance of the courts to enforce forfeitures. This rule requiring that a forfeiture be set up as an affirmative defense and established by clear and convincing proof is not only not inconsistent with but has no particular connection with proof of labor statutes such as Alaska's Waskey Act and the similar statutes in force in various of the states, including specifically New Mexico, Idaho and now Oregon, which give evidentiary effect to the filing or failure to file proofs of labor and provide in certain cases, that if the proofs of labor are not filed the primary burden of proof is shifted. The Waskey Act and similar statutes merely afford a means by which the primary burden of proof, imposed by Hammer vs Garfield Mining Company and similar cases may be met by the party having it under certain circumstances. Not only have no precedents been overturned by the ruling of the Circuit Court of Appeals on this point, but on the contrary had the Circuit Court adopted petitioners theory, it would have wiped out not only these provisions of the Waskey Act but automatically and ipso facto the similar statutes of Idaho, New Mexico and Oregon as well. Respondent, therefore, submits that no prior precedents have been overturned, and no new, novel or important questions of

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law are involved but the Circuit Court of Appeals has merely followed and given effect to the plain provisions of an Alaska statute of long standing, which happens to be substantially identical to similar statutes in force in at least three states, and which have been recognized as valid and enforced by the Courts of those states for many years.

Petitioners also contend that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in directing that the cases be remanded with instructions to enter judgment for the Respondent (taking any incidental proof that may be required to establish the validity of her own locations) instead of directing a new trial as Petitioners desire. In connection with this Respondent points out that the trial of this case in the District Court consumed eight days (pages 87-88 Tr.). Petitioners had a full opportunity at that time to submit all evidence they had. Petitioners' counsel deliberately led the Trial Judge into an erroneous theory in direct contravention of the plain terms of an express statute, the Waskey Act. They chose to ignore that statute upon the theory that all of its provisions had been impliedly repealed. There has already been spent in court costs and attorney's fees in this case almost as much as the ground involved is worth. It would be a

real hardship, in fact a calamity to the Respondent with her limited means to be required to go back and now undergo another protracted trial with the prospect of a possible further appeal to the Circuit Court of Appeals and perhaps to this court before the matter was completed. There must be an end to litigation. Respondent submits that on neither ground is the discretionary remedy of certiorari justified in this case and that to grant it would cause great hardship upon the Respondent.

A further reason exists why it would appear useless to grant certiorari in this instance and that is, that assuming the correctness of petitioners' contention which was approved by the Circuit Court of Appeals that the 1938 Amendment to the 1900 law ipso facto wiped out all intervening statutes contrary to or conflicting with the general mining laws, petitioners could not in the end, under any circumstances, prevail. If, as petitioners contend and the Circuit Court of Appeals held the 1938 Amendment restored the general mining laws in full force in Alaska and wiped out all intermediate acts such as the automatic forfeiture clause of Alaska's Waskey Act that were at variance with the general mining laws, then it is apparent that the District Court itself had no jurisdiction over these suits because they were commenced too late and the only final result would be a dismissal for want of jurisdiction, which would, of course, have the same effect as a

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decree sustaining respondent's claims as directed by the Circuit Court of Appeals. These several matters will be discussed under appropriate sub-heads in the portions of this brief which follow.

ANSWER TO PETITIONERS' FIRST POINT—THERE IS NO CONFLICT BETWEEN HAMMER vs GARFIELD MINING COMPANY AND SIMILAR DECISIONS AND THE RULING OF THE CIRCUIT COURT OF APPEALS IN THIS CASE.

Petitioners' argument on this point (Pages 8 to 11 Pet.) is predicated upon a misconception of the holding in Hammer vs Garfield Mining Company and the many other decisions, both state and federal, which announce the same ruling. What these cases hold and all that they hold is that forfeitures are not favored by the law and that forfeiture is accordingly an affirmative defense which must be specially pleaded and then established by clear and convincing proof. The holding in these cases is predicated, incidentally, as we will show in our discussion of petitioners' next point, not upon any interpretation of the Federal Mining Laws but upon principles of practice which long antedate the mining code. They are based upon the traditional hostility of the Courts to forfeitures. These cases are good law. They represent the rule in ju-

risdictions having proof of labor statutes like Alaska's Waskey Act as well as in states that do not. There are now at least three states which to our knowledge have proof of labor statutes substantially identical with these provisions of Alaska's Waskey Act. Those states are New Mexico, Idaho and Oregon. In all of those states the doctrine of the Hammer case is fully recognized. The Circuit Court of Appeals for the Ninth Circuit in the case of Cache Creeek Mining Company vs Brahenberg, 217 Fed. 240 on 241 recognizes the rule in the following language:

> "A forfeiture must be set up before it can be insisted upon." Citing Bishop vs Baisley, 28 Ore. 119, 21 Pac. 936.

This case was an appeal from Alaska decided in 1914, seven years after the Waskey Act went into effect there. As previously stated all these authorities merely announce the rule that forfeiture is an affirmative defense and that the burden is upon the party claiming the forfeiture to allege and prove it. But although they establish that forfeiture is an affirmative defense which must be pleaded and proved and accordingly the party alleging forfeiture has the primary burden of proof to establish it; they do not in any way suggest how the party having that burden shall sustain it or that the initial burden of proof may not, in a proper case, and on a showing of appropriate facts *be shifted.* In a brief of this kind it is

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undesirable to go into any elaborate technical discussion or finespun distinctions but it is well established that the original burden of proof or as it should perhaps more accurately be called the burden of going forward with evidence, frequently shifts during the course of the trial. See 20 Am. Jur. Title Evidence, Sections 132 and 133, pages 134 to 136, 31 C.J.S. Title "Evidence", Sections 110 and 111, pages 718 to 720. This is precisely the effect of such statutes as Alaska's Waskey Act and the similar statutes in force in the states of New Mexico, Idaho and now Oregon. They shift the burden of proof. The Waskey Act states (page VI Appendix to Petition) "Such affidavit shall be prima facie evidence of the performance of such labor or making of such improvements, but if such affidavit is not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual labor and improvements". There is nothing particularly novel or unusual in principle, about such a law.

If space permitted many statutes could be pointed out where the failure to file formal evidence of the performance of a certain act is made prima facie evidence that the act was not done or in other words, shifts the burden of proof upon the party to show that it was done. As previously stated, forfeiture is an affirmative defense and the burden is upon the person alleging it to prove it. That

proof can ordinarily be accomplished in one of two ways. First, by affirmative testimony to the effect that the annual labor was not done or, secondly, by a showing of facts from which the law will presume hat it was not done or which will shift the burden of proof upon the adverse party to show that it was done. Such is the effect of the Waskey Act and similar laws. Upon checking the codes of the states which have similar statutes it would appear that the statute most closely approximating this phase of the Waskey Act is the New Mexico proof of labor law. The Idaho and Oregon statutes state in substance:

> "The failure to file such affidavit within said time will be considered prima facie evidence that such labor has not been done." (Section 108-215 O.C.L.A. Idaho Statute quoted page 2480 Lindley on Mines, 3rd Edition, Volume 3)

The New Mexico Law (See 89 Pac. page 287 and Volume 3, Lindley on Mines, 3rd Edition, page 2314) states:

> "The failure to make and file such affidavit as herein provided ******* throws the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

At the time the Waskey Act was adopted in Alaska (March 2, 1907) there were apparently only two states, New Mexico and Idaho, which had this kind of law. Since the wording of the Idaho statute as above mentioned is different the conclusion seems inescapable that the Was-

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key act was copied from New Mexico. The Supreme Court of New Mexico in the early case of Upton vs Santa Rita Mining Company (14 New Mexico 96, 89 Pac. 275 on pages 287 et seq.) construed the New Mexico Act and held that it shifted the burden of proof precisely as we are contending here.

> "This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines (2nd Ed) 636), apparently the only jurisdictions having such a law. As is said by the very thorough author: '*Ordinarily, the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico, where there is a failure to file the proof of annual labor, it would seem that this rule is modified and the burden is shifted.* We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree and effect of evidence within reasonable lines, and we do not think these provisions unreasonable.'
>
> "In this case the proof shows that the holder of the Pinder claim made and filed an alleged proof of labor for 1897. But this, when tendered in evidence, was, upon objection, rejected by the Court as not made in conformity with section 2315, Rev. St. U.S. (U.S. Comp, St. 1901, p. 1421). A comparison of it with the statute convinces us that the court below was correct in so holding. Indeed, that ruling is not questioned here. In legal effect, therefore there was a failure by the owner of the claim to make and file the statutory proof, *and this under the statute, threw upon it, and not upon plaintiff, the burden of proving that 'such work had been done according to law'* *** Had the defendant complied with the statute as to making its proof of labor, it would probably have

> been entitled to this instruction; but its failure to take this very simple precaution for the protection of its rights imposed upon it, and not upon its adversary, the burden of proof." (287-8)

This phase of the matter is admirably summed up by the Circuit Court of Appeals in footnote 6, page 489, 175 Fed. 2nd:

> "Many of the Western states have statutes providing for the recording of proofs of labor. At least two of these statutes, those of Idaho and New Mexico, Sec. 47-606, Idaho Code; Compiled Laws of New Mexico 1897, paragraph 2315, contain virtually the same provisions as those of the Waskey Act relative to the shifting of the burden of proof. If these local enactments are inconsistent with the paramount mining laws of Congress they could hardly have escaped condemnation during the many decades they have been on the books, yet so far as we are advised that validty has never been successfully challenged. In discussing the Idaho and New Mexico statutes Lindley has expressed the view that this class of state legislation is unobjectionable. "The several states," he observes, "have a right to define the nature, degree, and effect of evidence, within rational limits, and we do not think these provisions unreasonable." Lindley on Mines, 3d Ed., paragraph 636, p. 1383."

To summarize, there is no inconsistency or conflict whatever between this proof of labor clause in the Waskey Act and the case of Hammer vs Garfield Mining Company and the others which announce the doctrine that forfeiture must be affirmatively pleaded and proved by the party asserting it. The Hammer and other cases mere-

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ly announce a rule, universally recognized, of primary pleading and practice. The Waskey Act and similar statutes provide a means by which proofs of labor may be given evidentiary effect if timely filed and makes the failure to file them evidence that the work was not done or, in other words, shifts the burden of proof over to the claimant to show that the work was done.

As regards the observations contained on page 10 of the Petition, to the effect that the old time sourdoughs are nomad types and rapidly dying off so that the person that has the burden of proving that annual labor was or was not done twenty, thirty or forty years ago has a particularly difficult task, we may say that the Waskey Act has been on the books in Alaska since 1907 and was designed to overcome this very difficulty. The primary purpose of statutes such as this provision of the Waskey Act is to afford a convenient means of preserving evidence that the annual assessment work was done. It is to be borne in mind that the general mining law themselves make no provision for the filing of proofs of labor and give such proofs of labor when filed no evidentiary effect. The Waskey Act and similar state laws provide that when proofs of labor are filed they are prima facie evidence of the facts therein setforth. It seems obvious, incidentally, that if the States could lawfully legislate upon such a subject and give to proofs of labor prima facie

evidentiary effect if filed, they could also lawfully provide that failure to file would have the reverse effect; that is, be prima facie evidence that the work was not done or, stated otherwise, shift the burden upon the claimant to show that it was. Petitioners themselves in this very case availed themselves of the favorable evidentiary effect of filing proofs of labor for certain years, (see exception No. 8 pages 116 to 131 Tr.) while vigorously opposing the adverse evidentiary effect of failure to file for other years.

All the claimant needs to do is comply with the quite simple provisions of the Waskey Act and record his proof of labor or suspension notice each year and the difficulty which petitioners apprehend in proving performance of annual labor is automatically eliminated. Having such a statute available, which provides such a simple and ready means of affording evidence that the assessment work is done, when it is performed, it seems no more than just that the statute should likewise declare as does the Waskey Act that if the recording is not complied with, the presumption should be that the work has not been done and the burden shifted upon the claimant to show that it was. What is sauce for the goose is sauce for the gander. Petitioner, United States Smelting, Mining & Refining Company, with its extensive legal staff must have realized when it purchased this ground, the deficiencies in its

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chain of title, and the fact that proofs of labor and suspension notices were not recorded for many years intervening since the claims were located. They were, accordingly, fully aware from the outset of the difficulties with which they would be confronted when their title was questioned.

RESPONDENT'S ANSWER TO PETITIONERS' SECOND POINT—THE DECISION IN HAMMER VS. GARFIELD MINING COMPANY IS NOT BASED UPON ANY INTERPRETATION OF THE FEDERAL MINING LAWS.

It will be obvious to anyone reading the decision of Hammer vs Garfield Mining Company and considering it in connection with the Federal Mining Laws that that decision is not and cannot be based upon an interpretation of any provision in those laws. There is absolutely nothing in the Federal Mining Laws themselves which in any way attempts to legislate upon where the burden of proof lies in the event of forfeiture. Sec. 2324 Rev. Statutes (30 U. S. Code Annotated 28) merely states:

> "And upon a failure to comply with these conditions, the claim or mine upon which such failure ocurred shall be open to relocation in the same manner as if no location of the same had ever been made, etc." (pages I and II App. to Petition)."

Obviously there is nothing here or in any of the other provisions of the mining law itself upon which to base an interpretation as to where the burden of proof rested in the event of forfeiture. The Hammer case itself, the entire applicable portion of the decision of which is quoted at pages 11 and 12 Petition, does not indicate the basis for the decision. Other cases, however, announcing the same rule clearly show the reasoning upon which it is predicated. We have already cited and quoted from the early Oregon case of Bishop vs Baisley. Similar statements will be found in many of the authorities cited by petitioners.

> "It is a settled law that equity favors neither forfeitures nor penalties." (From Willitt vs Baker, 133 Fed. 937 on 946. Cited page 9 Pet.):
>
> "*Forfeitures, however, are not as a general rule favored by the law.* A forfeiture of the mining claim cannot be estatblished except upon clear and convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law." (From Justice Mining Company vs Barkley, 82 Fed. 354 on 359. Cited page 9 Pet.)
>
> "*The courts are reluctant to enforce a forfeiture, deeming this class of penalties odious in law;* and it is well settled by decisions that forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law, the burden of proving which rests upon the party asserting it." (From Emerson vs McWhirter (Calif.) 65 Pac. 1036 on 1038. Cited page 10 Pet.)

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The text writers uniformly give the same reason for the rule. The following quotation is from Snyder on Mines, Volume 1, Section 554, page 503:

> "Since it is axiomatic that forfeitures are odious to the law, and for that reason are not countenanced or favored by the courts, all doubtful cases will be construed against the forfeiture. But while this is true, the law exacts a faithful compliance with the conditions required. Yet the burden of proving a forfeiture falls upon the person alleging it, and it is always a question of fact for the jury whether a mining claim had been abandoned or forfeited prior to relocation."

Lindley, of course, discusses the matter in even more detail. Lindley on Mines, 3rd Edition, Volume II, Section 645 is cited by the Circuit Court of Appeals in its opinion in support of the following statement:

> "This rule is not declared by the statute but is merely expressive of the traditional hostility of the law toward the enforcement of penalties and forfeitures." (175 Fed. 2nd, pages 487-8)

We direct attention particularly to the following:

> "The Courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.' (Lindley Third Edition, Sec. 645 page 1607)

In a previous section Lindley has some critical things to say regarding the extent to which the Courts have gone in their reluctance to enforce this type of forfeiture:

> There is probably no single provision of the law which is evaded to a greater extent than this one is. While, of course, there are many exceptions, the average locator will exhaust his ingenuity in attempting to avoid this plain and wholesome requirement. The Courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it." (Lindley on Mines, Third Edition, Sec. 624, Pages 1532-3)

The above should be ample to establish the already self-evident proposition that the decision in the case of Hammer vs Garfield Mining Company was not predicated upon any construction or interpretation of the mining law itself but rather upon the traditional hostility of the Courts to forfeitures and the reluctance of the Courts to enforce the forfeiture, not only of a mining claim but of any estate, which hostility of course is entirely independent of and long antedated the Federal Mining Laws. Courts are reluctant to enforce all forfeitures and they approach the forfeiture of mining claims with this traditional reluctance. Forfeiture of a mining claim is an affirmative defense and must be established by clear and convincing evidence, not because it is a mining claim, but because all forfeitures must be so established.

It is quite true this Court in the subsequent case of El Paso Brick Company vs McKnight, 233 U. S. 250 on

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259-60 used the language quoted on page 12 of the petition.

In doing so, however, it is quite clear that the Court was merely paraphrasing the contentions of the appellant on this point and expressing no opinion as to whether those contentions were correct or not. This is, of course, obvious in the opening clause of the quotation which states "this conclusion makes it unnecessary to decide the question." The case had already been reversed on entirely different grounds which rendered unnecessary the consideration of this point. It is indeed rather startling that a statement in a Court's decision, declining to pass upon a certain point, should be cited as authority, as it has been here, for the very proposition which the Court refused to decide. The decision of the lower Court in the case of McKnight vs El Paso Brick Company from which the appeal to this court was taken (16 New Mexico 721, 120 Pac. 694)clearly, and we believe correctly, bases the ground for decision upon the terms of the local statute and not upon any construction of the Federal Mining Laws. We quote from the opinion:

> "Counsel for appellants say that there was no obligation of any character upon the appellee to show that appellant had not filed such an affidavit; that the statute in substance is that the burden shall be upon the owner, unless he files such an affidavit, and in order to escape such a burden he may show, there-

fore, that he has filed such affidavit. And that if when he offers such affidavit in evidence the opposing party can see that it does not comply with the statute and that, therefore, it may be excluded, he has then to object to its introduction. In other words it is the position of the counsel for appellant that the appellee should have introduced evidence showing a failure to do the annual labor, and if he was able to produce clear and convincing proof of the failure of the appellant to have the annual work done, often times a matter of great difficulty, then the appellant would have been put to proof, and then if he offered the affidavit the appellee could have objected. *No court we take it would sanction such a waste of time to do an unnecessary thing.* The attorney for the appellee knew that the appellant had not filed the statutory afidavit. It was his duty to establish that fact first, and to that he was compelled to put the record in evidence and the records contained the faulty affidavit.*******

We think that there was an obligation upon the appellee to show that the appellant had not filed such an affidavit. The statute is one of convenience. If the owner will not file the affidavit, *it places upon him the burden of showing that he has complied with the law,* such compliance being necessary to the maintenance of his estate, and the facts proving the same being peculiarly within his own knowledge and easier far for him to show their existence, if they did exist, than it would be upon the other party to show their non-existence." (120 Pac. 701)

It is perhaps of some importance in showing that the point involved here is not one of common or general interest to mention that although more than twenty five years have elapsed since the case of El Paso Brick Company vs McKnight came before this court and in spite of

the fact that as above shown not only Alaska's Waskey Act but the statutes of Idaho and now Oregon as well contained substantially identical provisions with the New Mexico law then under discussion no other case has arisen during the interval where the validity and alleged conflict of these statutes with the Federal Mining Laws has been urged. The matter is not one of general interest but of importance only to an increasingly small group, those locating and holding mining claims upon the public domain.

It is, however, entirely correct that if petitioners contentions were sustained and this provision of the Waskey Act declared impliedly repealed because of its alleged repugnance to the general mining laws as interpreted in Hammer vs Garfield Mining Company then not only would the Waskey Act provisions be wiped out but the similar statutes in Idaho, New Mexico and Oregon would also automatically be nullified. Indeed, since there would seem to be no difference in principle between a statute declaring that failure to file a proof of labor was prima facie evidence that the work was not done and a statute that said that filing a proof of labor was prima facie evidence that it was, it would seem that all the proofs of labor statutes in the many states that have enacted them would be wiped out.

It is believed that this Court will be slow to bring about

such a result particularly when neither the provisions of the general mining laws nor any prior decision in any way requires it.

RESPONDENT'S ANSWER TO PETITIONER'S THIRD POINT—THERE MUST BE AN END TO LITIGATION.

As previously stated, the Waskey Act has been in force in Alaska since 1907. The validity of these proof of labor provisions had never been questioned prior to the trial of the present cases. The Honorable Harry G. Pratt, the District Judge before whom these cases were tried, had in a previous case of Koprivica vs Sather, 10 Alaska Reports 593, ruled that the automatic forfeiture clause of the Waskey Act had been impliedly repealed but at that time he expressly recognized the proof of labor provisions of the Act to be still in force. We quote from the opinion in that case:

> "Consequently when the act of May 31, 1938 repeated the wording of Section 26 as passed June 6th, 1900, and left out ony reference to the Waskey Act, it seems clear that Congress intended to make the general mining laws as they existed in 1938 control in Alaska over the Waskey Act *as to matters in which the two laws conflict, i.e.*, as to the resumption of work after the failure to do annual labor. *The other provisions of the Waskey Act still remain in full force.*" (Pages 597-8)

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The experienced and able counsel for petitioners well knew that under the express provisions of this statute the burden of proof would be shifted upon them to prove that the annual labor had been performed as to those years for which no proofs of labor or suspension notices were filed. Instead of attempting to meet this burden they advanced and succeeded in getting the trial Judge to adopt the novel and unsupported theory that these proof of labor provisions of the Waskey Act had been impliedly repealed in 1938 along with the automatic forfeiture clause. This theory as stated was wholly unsupported by any prior decision and was in fact contrary to the previous ruling of the same Trial Judge in Koprivica vs Sather. By so doing petitioners' counsel deliberately put their case in hazard. As pointed out by the majority opinion of the Circuit Court of Appeals on this point, this is quite simply a case where a party, having by express statute the burden of proof upon a certain issue, deliberately failed and refused to discharge that burden, relying upon an erroneous conception of the law which was not caused by any prior decision of the court but was purely of his own making. Under the record as it appeared here there was a complete failure of proof on the part of the petitioners, as regards these years upon which the statute cast the burden of proof upon them. As stated by the Circuit Court of Appeals:

> "In this state of the proof the District Court was obliged to find for the appellant." (175 Fed. 2nd 490)

The cases should have terminated by a judgment in respondent's favor upon a directed verdict. We direct attention to the following quotations from 5 C. J. S. Title Appeal and Error:

> "Substantially the same is the rule, confirmed by statute in some jurisdictions, that the Appellate Court will render or order the proper judgment for defendant or against plaintiff, where the Trial Court should have sustained a demurrer to plaintiff's evidence or should have, under the evidence, directed a verdict or given a peremptory instruction for defendant." (Section 1927, p. 1435)
>
> "The rule permitting the Appellate Court to order or direct a dismissal or non-suit is especially applicable where the lower court should have entered an order of dismissal or non-suit." (Sec. 1928, p. 1437)

Identical statements will be found in 4 C. J. at pages 1189 and 1190. While petitioners do not raise the point it may perhaps be well to point out that although tried with an advisory jury, these were equity suits, not actions at law. There is accordingly no prohibition upon the court under the Seventh Amendment to the Federal Constitution as construed in the case of Slocom vs New York Life Insurance Co. (228 U. S. 364, 33 S. C. 523) against rendering a final decree.

It seems to us that the error into which Judge Pope

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falls in his dissenting opinion on petition for rehearing is in concluding as he does in the opening portions (176 Fed. 2nd 813):

> "We have just finished deciding, now for the first time, an important question of property law for Alaska. It is a matter which previously has been in doubt, and I do not think the appellee should be forever foreclosed from showing, if it can, that the claims were represented, merely because its attorneys took too advanced a position on the former trial."

This statement, it is submitted, finds no support in the record. The Waskey Act, as previously stated, has been the law of Alaska and recognized there since 1907. The act expressly directs in so many words upon whom the burden of proof shall rest if the proofs of labor are not filed. There can be no doubt or ambiguity as to the terms of the statute. Petitioners counsel advanced and elected to rely upon the novel and unsupported theory that this provision of the Act had been impliedly repealed along with the rest in 1938.

It appears to us and we most respectfully submit that respondent has already been sufficiently penalized as a result of petitioners acts through having to incur the expense and delay of an appeal to the Circuit Court of Appeals for the purpose of correcting the error. If she is obliged to incur the further expense and delay of an appeal to this Court and then a retrial in the District Court

with the prospect of still further appeals she will, regardless of the ultimate outcome for all practical purposes have lost the case. We stated in our briefs in the Circuit Court of Appeals and repeat here; the one advantage which a large organization enjoys in litigation against a private individual is that to the organization expense and delay may mean little, while to the individual they are frequently everything. While we are certainly making no bid for sympathy from this Court on that account respondent is a rivate individual with limited means. She is not a multi-million dollar corporation like the principal petitioner, United States Smelting, Refining & Mining Company. As previously pointed out the trial in the Court below consumed eight days (August 6 to 15, 1947). Petitioners and their counsel had ample opportunity at that time to submit further proof if they so desired. As will be apparent from the record, the trial of these cases in the District Court and the expense of the appeal to the Circuit Court of Appeals has already been a severe burden upon the Respondent. If we now add to that the further expense and delay of an appeal to this Court followed by a further protracted trial in the District Court, with as previously stated prospects of further appeals, we will have reached the situation where the expense of the litigation will amount to much more than any conceivable value which the small amount of land (100 acres) involved in these cases could have.

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In addition it may be pointed out that Congress has definitely indicated that the moratorium on assessment work on mining claims will not be extended beyond the last fiscal year. The filing of adverse claims and the pendency of the adverse suits do not, of course, suspend the assessment work requirement. If certiorari is granted and this matter goes up on appeal to this Court, Respondent will be obliged in order to keep her claims in force under Alaska law, to spend $500.00 for annual labor and assessment work between now and July 1, 1950. This expenditure will be of necessity a dead loss because with the claims tied up in litigation she cannot sell them or enter into any real program for their development. It is submitted that there must be an end to litigation. A litigant merely because it happens to occupy a position where expense and delay are of small moment should not be permitted to wear out the opposition to the point where a meritorious cause perhaps has to be abandoned through sheer exhaustion of financial resources. Courts should be a means of administering speedy justice, not an endurance contest.

ADDITIONAL REASON WHY CERTIORARI SHOULD BE DENIED—PETITIONERS CANNOT ULTIMATELY PREVAIL ON THE MERITS IN THIS CASE.

There is still another reason why it is submitted cer-

teriorari should be denied in this case. That is because, under their own theory petitioners could not hope to ultimately prevail on the merits. One of petitioners contentions in the District Court, and to this extent they were sustained by the Circuit Court of Appeals, was that the automatic forfeiture clause of the Waskey Act was implied repealed with the re-enactment of the General Mining Laws as applied to the territory of Alaska in 1938. In this we think both the District Court and the Circuit Court of Appeals erred because the 1938 amendment was not a new enactment (page VII, Appendix to Pet.) on the subject; extending the mining laws of the United States to the Terirtory of Alaska. This provision of the 1938 Act was copied word for word from the original 1900 law; the changes being in regard to other provisions of the law (Mining on tidelands, etc.). It is our belief that under well established principles of law which were submitted in Appellant's Opening and Reply Briefs to the Circuit Court of Appeals the amendatory act is not to be deemed a new enactment so as to wipe out intermediate Acts such as the Waskey Act which have modified or enlarged the original law. We will urge this matter at the proper time in this Court, should certiorari be granted, but for present purposes, let us assume that petitioners position is correct. The implied repeal of the automatic forfeiture clause of the Waskey Act is pred-

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icated upon the fact that it is inconsistent and at variance with the doctrine of resumption of work in the general mining laws. In other words it is petitioners position, which the Circuit Court of Appeals sustained, that all intermediate enactments conflicting or inconsistent with the General Mining Laws were automatically wiped out by the 1938 amendment. But the Waskey Act is only one of a series of special mining laws applicable to Alaska which modify or conflict with the General Mining Laws to a greater or lesser extent. We will now direct attention to one of the others. The Waskey Act is Title 48, Section 384, U.S.C.A. Section 385 provides for the filing fees on proofs of labor and the next Section Title 48, Section 386 passed in 1910 extends the time for filing adverse claims in Alaska until eight months after the close of the sixty day period of publication and the time for filing adverse suits until sixty days after the adverse claim is filed in the Land Office. Under the General Mining Laws Title 30,, Sections 29 and 30, and adverse claim must be filed during the period of publication and the adverse suit within thirty days thereafter. Accordingly, assuming that petitioners and the Circuit Court of Appeals are right, and the 1938 Amendment wiped out everything in conflict with the General Mining Laws enacted prior to that date *then these cases were commenced too late and the lower Court never had jurisdiction to hear them in the first place.* See Lindley on Mines, Third

Edition, Volume III, Section 756, pages 1850-1. Little vs Morris (Idaho) 284 Pac. 1029. Steeves vs Carson, 42 Fed. 821. The record affirmatively discloses (pages 4, 5, 8, 9 and 10 Tr.) that petitioners did not file their adverse claims in the Land Office or commence these suits until long after the period required by the General Mining Laws. The notice of application for patent was published from June 5 to August 3, 1945, the adverse claims were filed on March 29, 1946 and these suits were not commenced until May 27, 1946.

Of course, Respondent did not raise this point in the District Court. Under her theory of the law the actions were timely brought because she did not acquiesce in this doctrine of implied repeal. However, if it be determined that she was in error on this point and the decision of the District Court and the Circuit Court of Appeals holding that the automatic forfeiture clause of the Waskey Act was impliedly repealed by the 1938 Amedment stands, then it must follow as of course that Section 386, Title 48 was also and ipso facto impliedly repealed, and Respondent will raise the point at the first opportunity, as she would obviously be entitled to do under the circumstances. It, therefore, seems clear that if this Court were to grant certiorari and Petitioners were to prevail in their contentions the ultimate result would still be a dismissal of these suits for want of jurisdiction because

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not timely brought. This of course in legal effect would be the same as a judgment in Respondent's favor.

CONCLUSION.

In conclusion it is, therefore, respectfully submitted that certiorari should be denied; first, because there are no conflicting decisions or novel and important points of law to be settled; second, because granting it would work a great hardship and injustice upon the Respondent and, third, because it could in the long run in any event result in no benefit to the Petitioners.

Respectfully submitted,

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Attorneys for Respondent, Emma Grace Lowe.

No. 489. UNITED STATES SMELTING REFINING & MINING CO. ET AL. *v.* LOWE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The Court is of the opinion that a new trial should be granted. Accordingly, without expressing any opinion as to other questions presented, the judgments of the Court of Appeals and the District Court are vacated and the cause is remanded to the District Court with directions to grant a new trial. *Southall R. Pfund* for petitioners. *Blaine Hallock* and *James T. Donald* for respondent. Reported below: 176 F. 2d 813.

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END OF CASE